

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
JUDGE LAURA S. TAYLOR, PRESIDING

IN RE ) CASE NO. 17-05276-LT  
CESAR & KRYSTAL ANNE MEDINA, ) ADV. NO. 19-90065  
DEBTORS. )  
KRYSTAL ANNE MEDINA, ) CHAPTER 7  
PLAINTIFF, )  
VS. )  
NATIONAL COLLEGIATE STUDENT )  
LOAN TRUST 2, )  
DEFENDANT. )

1) PRE-TRIAL STATUS CONFERENCE (FR. 12/4/19)  
2) MOTION FOR SUMMARY JUDGMENT FILED ON BEHALF OF NATIONAL  
COLLEGIATE STUDENT LOAN TRUST 2006-3

REPORTER'S TRANSCRIPT OF PROCEEDING

VOLUME I, PAGES 1 – 71

SAN DIEGO, CALIFORNIA

WEDNESDAY, MARCH 11, 2020

JENNIFER GIBSON, CSR NO. 12802  
SAN DIEGO BANKRUPTCY REPORTERS  
SOLANA BEACH, CALIFORNIA 92075  
(760) 807-2221

U.S. BANKRUPTCY COURT  
325 WEST "F" STREET  
DEPARTMENT 1  
SAN DIEGO, CA 92101

1 APPEARANCES OF COUNSEL:

2

3 FOR THE PLAINTIFF, KRYSTAL ANNE MEDINA:

4 CHRISTOPHER R. BUSH, ESQ.  
5 & AUSTIN SMITH, ESQ.  
6 2727 CAMINO DEL RIO SOUTH, SUITE 135  
7 SAN DIEGO, CALIFORNIA 92108  
8 619.678.1134  
9 CHRIS@CHRISBUSHLAW.COM

10 FOR THE DEFENDANT, NATIONAL COLLEGIATE STUDENT LOAN TRUST

11 06-00003:

12 RICHARD A. SOLOMON, ESQ.  
13 11682 EL CAMINO REAL, SUITE 250  
14 SAN DIEGO, CALIFORNIA 92130  
15 858.793.8500  
16 RICHARD@SGLWLAW.COM

17

18

19

20

21

22

23

24

25

1        SAN DIEGO, CALIFORNIA; WEDNESDAY, MARCH 11, 2020

2                                10:00 A.M.

3

4                    THE CLERK:    ALL RISE.    DEPARTMENT 3 OF THE  
5    U.S. BANKRUPTCY COURT IS NOW IN SESSION.    YOUR  
6    HONORABLE LAURA S. TAYLOR, JUDGE, PRESIDING.    PLEASE  
7    BE SEATED AND COME TO ORDER.    GOOD MORNING, YOUR  
8    HONOR.

9                    THE COURT:    GOOD MORNING.

10                  ALL COUNSEL:    GOOD MORNING, YOUR HONOR.

11                  THE CLERK:    MATTER NO. 1, KRYSTAL MEDINA  
12    VERSUS NATIONAL COLLEGIATE STUDENT LOAN TRUST 2.  
13    PRE-TRIAL STATUS CONFERENCE CONTINUED FROM 12/4 AND  
14    MOTION FOR SUMMARY JUDGMENT FILED ON BEHALF OF  
15    NATIONAL COLLEGIATE STUDENT LOAN.    MAY WE HAVE  
16    IN-COURT APPEARANCES, PLEASE.

17                  MR. BUSH:    GOOD MORNING, YOUR HONOR.  
18    CHRIS BUSH ON BEHALF OF PLAINTIFF/DEBTOR.

19                  THE COURT:    THANK YOU.

20                  MR. SMITH:    GOOD MORNING, YOUR HONOR.  
21    AUSTIN SMITH ON BEHALF OF THE PLAINTIFF/DEBTOR.

22                  THE COURT:    THANK YOU.

23                  MR. SOLOMON:    GOOD MORNING, YOUR HONOR.  
24    RICH SOLOMON ON BEHALF OF DEFENDANT.

25                  THE COURT:    ALL RIGHT.    GOOD MORNING.    ALL

1 RIGHT. MR. SUMMERLAND; IS THAT IT?

2 MR. SOLOMON: SOLOMON. S-O --

3 THE COURT: SOLOMON. OH.

4 MR. SOLOMON: L-O-M-O-N. SORRY, YOUR  
5 HONOR.

6 THE COURT: THAT'S OKAY. ALL RIGHT. MR.  
7 SOLOMON, IT IS YOUR MOTION. YOU MAY --

8 MR. SOLOMON: YES, YOUR HONOR. FIRST OF  
9 ALL, I'D LIKE TO APOLOGIZE TO THE COURT AND TO YOUR  
10 HONOR FOR THE PROCEDURAL VIOLATIONS AND THE  
11 VIOLATIONS OF THE LOCAL RULES. THEY ARE  
12 INEXCUSABLE. VERY SORRY THEY WERE DONE. I'M  
13 CO-COUNSEL. I'M LOCAL COUNSEL. I CAN'T PASS THE  
14 BUCK. WE DID NOT PREPARE IT. IT WAS FILED WITHOUT  
15 OUR SEEING IT. STILL NO EXCUSE. BUT TO NOT GO  
16 FORWARD TODAY I THINK WOULD BE A DISSERVICE. I  
17 DON'T THINK THERE'S BEEN A PREJUDICE. I THINK TO --  
18 IF WE WOULD CONTINUE THIS MATTER OR REFILE IT WOULD  
19 BE A LOT OF COST, JUDICIAL TIME AND ENERGY WASTED.  
20 YOUR HONOR HAS OBVIOUSLY READ EVERYTHING, ISSUED A  
21 VERY LONG TENTATIVE RULING. TO START FROM SQUARE  
22 ONE AGAIN I THINK WOULD JUST BE A LOT OF WASTE, TIME  
23 MONEY AND ENERGY OF THIS COURT. SO I WOULD ASK THE  
24 COURT TO FORGIVE WHAT WE'VE DONE, AND I WOULD  
25 PROMISE IT WOULD NOT HAPPEN AGAIN BY MY OFFICE.

1 THE COURT: ALL RIGHT. I CAN SAY THAT I'M  
2 THE ONLY JUDGE IN THIS COURT THAT DOES NOT I THINK  
3 ROUTINELY ASSESS SANCTIONS, SMALL DOLLARS, BUT STILL  
4 MONETARY SANCTIONS FOR NON-COMPLIANCE WITH THE LOCAL  
5 RULES. THIS ONE MADE ME THINK ABOUT IT. I'M NOT  
6 GOING TO CHANGE MY JUDICIAL PHILOSOPHY, AS THAT'S  
7 INAPPROPRIATE, BUT WE ACTUALLY USE THOSE THINGS.  
8 AND IN SOMETHING AS COMPLICATED AS THIS, I  
9 ACTUALLY -- ONE TOOL I HAVE IS TO COMPARE THE CASE  
10 LIST AND TO SEE WHERE THERE'S SIMILARITIES, WHERE  
11 THERE ARE DIFFERENCES, LOOK AT THE TABLES OF  
12 CONTENTS, SEE WHERE THEY COALESCE AND WHERE THEY  
13 DON'T. AND TAKING THOSE TOOLS AWAY FROM ME IS  
14 UNFAIR. SO -- AND I DID ALLOW A SUR-REPLY WHICH IS  
15 SOMETHING, SO -- AND IN MY METRICS FOR THE  
16 SUR-REPLY, AT LEAST IN PART, WAS LOOKING AT THIS AND  
17 SAYING, "NOT ONLY IS A SUR-REPLY APPROPRIATE GIVEN  
18 WHAT'S ON REPLY, THEY WENT OVER THE PAGE LIMITS." I  
19 NOTICE THOSE THINGS.

20 SO I'M NOT INCLINED TO DO ANYTHING TO YOU  
21 TODAY ON THAT, BUT IT COLORS MY VIEWS AS TO HOW  
22 SERIOUSLY THIS WAS TAKEN AND AS TO THE ATTITUDE  
23 TOWARDS GOING FORWARD. AND YOU'LL SEE THAT TO SOME  
24 EXTENT AS WE GO THROUGH THE -- GO THROUGH THE  
25 PRESENTATION SOME OF THE CONCERNS I HAVE. BECAUSE I

1 DO HAVE THE FEELING THAT, HAVING PREVAILED IN OTHER  
2 COURTS, THE IDEA IS THAT WHILE I DON'T THINK  
3 ANYONE'S ARGUING THAT THOSE DECISIONS ARE  
4 PRECLUSIVE, EITHER AS A MATTER OF ISSUE OR CERTAINLY  
5 AS TO DECISION, THAT I -- THAT YOU GET TO KIND OF  
6 PUT YOUR HANDS BEHIND YOUR HEAD, KICK UP YOUR FEET  
7 AND SAY, "SEE, THEY DID IT. WHY DON'T YOU DO IT,  
8 TOO?" AND THAT JUST ISN'T THE WAY IT WORKS. SO HAD  
9 THE -- HAD THE ERRORS NOT BEEN MADE, MAYBE I  
10 WOULDN'T BE SO FIRMLY EMBEDDED IN THAT POSITION, BUT  
11 I AM. SO YOU'RE GOING TO DO IT BY THE NUMBERS, YOUR  
12 SIDE, AND THAT MAY -- YOU MAY BE DOING SOME MORE  
13 WORK. WE MAY BE COMING BACK ANYWAYS. SO I'M NOT  
14 GOING TO NOT PROCEED BASED ON THAT, BUT YOU COME  
15 ENCUMBERED WITH SOME VIEWPOINTS THAT HAVE BEEN  
16 CREATED BY THAT FAILURE TO READ AND COMPLY WITH OUR  
17 LOCAL RULES.

18 MR. SOLOMON: I UNDERSTAND, YOUR HONOR,  
19 AND THAT IS UNFORTUNATE. AND I UNDERSTAND YOUR  
20 POSITION.

21 THE COURT: OKAY. ALL RIGHT. SO LET'S --  
22 LET'S GO THROUGH -- IT IS A LONG TENTATIVE. IT WAS  
23 A LOT OF PAPER. AND WHAT I AT LEAST TRIED TO DO IN  
24 THE TENTATIVE WAS DISTILL THE MOTION DOWN TO ITS  
25 ESSENCE. AND I HAVE SOME TOUGH QUESTIONS I THINK

1 FOR BOTH SIDES. BUT TAKING THE ISSUES -- FIRST OF  
2 ALL, DO YOU DISAGREE WITH THE THREE SORT OF ISSUES  
3 MR. BUSH MADE THAT I'VE LAID OUT AS THE THINGS I  
4 THINK NEED TO BE ESTABLISHED HERE; THAT THE SCHOOL  
5 WAS A NOT-FOR-PROFIT, THAT THE INSTITUTION NEED NOT  
6 BE AN EDUCATION INSTITUTION; AND THAT THE GUARANTEE  
7 OF THE PROGRAM SATISFIES THE PROGRAMMATIC FUNDING  
8 REQUIREMENT? DO YOU THINK THERE'S ANOTHER ISSUE?

9 MR. SOLOMON: NO, YOUR HONOR, I DO NOT.

10 THE COURT: OKAY. THEN LET'S TAKE THEM  
11 IN, PERHAPS, A DIFFERENT ORDER. DO YOU DISAGREE  
12 WITH MY ANALYSIS OF THE BURDEN OF PROOF?

13 MR. SOLOMON: OF THE BURDEN OF PROOF? NO,  
14 YOUR HONOR, I DON'T.

15 THE COURT: OKAY. ALL RIGHT. SO WE'RE  
16 HERE ON SUMMARY JUDGMENT. YOU HAVE THE BURDEN OF  
17 PROOF, SO YOU HAVE TO COME FORWARD WITH ADMISSIBLE  
18 EVIDENCE TO SUPPORT EACH OF THESE THEORIES. AND I  
19 WAS NOT OVERWHELMINGLY IMPRESSED WITH THE EVIDENCE  
20 THAT I HAVE, SO LET'S TALK ABOUT THE EVIDENCE THAT I  
21 HAVE TODAY. BECAUSE I THINK, AGAIN, THERE'S A  
22 STRONG SUGGESTION IN YOUR DOCUMENTS THAT, "HEY, WE  
23 PROVIDED THESE SAME POINTS TO ANOTHER COURT, THEY  
24 BOUGHT IT, YOU SHOULD BUY IT, TOO." BUT I DON'T  
25 HAVE THE RECORD IN THOSE PROCEEDINGS. I DON'T KNOW

1 THAT YOU PROVIDED EXACTLY THE SAME QUALITY OF  
2 DECLARATION, I DON'T KNOW THAT THE OTHER SIDE  
3 OBJECTED TO IT IN THE WAY THEY HAVE. THEY HAVE  
4 OBJECTED TO ALL YOUR EVIDENCE, SO I DON'T HAVE THE  
5 SITUATION WHERE I CAN SAY, "WELL, IF THEY'D  
6 OBJECTED, IT'D BE A PROBLEM, BUT THEY DIDN'T."

7 SO LET'S START WITH THE NOT-FOR-PROFIT  
8 ISSUE. WHAT EVIDENCE DO I HAVE, ADMISSIBLE EVIDENCE  
9 DO I HAVE IN THE RECORD HERE TODAY THAT IS PROPERLY  
10 BEFORE ME THAT WOULD ALLOW ME TO MAKE THAT  
11 CONCLUSION?

12 MR. SOLOMON: WELL, FIRST OF ALL, WE HAVE  
13 THE DECLARATION OF MR. LUKE. AND IT IS DONE UNDER  
14 THE CUSTODIAN OF RECORDS. I KNOW THERE ARE SOME  
15 DOCUMENTS MISSING WE WILL TALK ABOUT, BUT THE  
16 DOCUMENTS THAT WE PRESENTED HAVE ALL BEEN MATTERS OF  
17 BUSINESS RECORDS. HIS DECLARATION GOES THROUGH THE  
18 STEPS TO QUALIFY RECORDS, HIS BUSINESS RECORDS.  
19 BUSINESS RECORDS ARE USED ALL THE TIME. HE DOESN'T  
20 HAVE TO HAVE PERSONAL KNOWLEDGE OF THE DEAL BEING  
21 DONE, TESTIFIES AS TO THE RECORDS.

22 THE COURT: SO THAT EVIDENCE IS EVIDENCE  
23 THAT IN THOSE DEALS THE PARTIES ACCEPTED THAT THIS  
24 WAS A NOT-PROFIT ENTITY.

25 MR. SOLOMON: THAT WOULD BE PART OF IT,



1 YES, YOUR HONOR. I MEAN, THE DOCUMENT ITSELF THAT  
2 THE -- WAS SIGNED BY THE DEBTOR SAYS BOTH -- IN ONE  
3 POSITION SAYS THIS IS A NON-DISCHARGEABLE LOAN  
4 THAT'S MADE UNDER 523(A) (8), YOU KNOW, AND IT'S A  
5 NON-PROFIT SITUATION.

6 THE COURT: ARE YOU ARGUING THAT SHE'S  
7 ESTOPPED TO TAKE A DIFFERENT POSITION BASED ON THAT?  
8 BECAUSE I DON'T THINK SHE HAS PERSONAL -- OR ARE YOU  
9 ARGUING SHE HAD PERSONAL KNOWLEDGE?

10 MR. SOLOMON: WELL, I WOULD -- YEAH, I  
11 WOULD SAY SHE SIGNED THE DOCUMENT, HAS THE  
12 OBLIGATION TO READ THE DOCUMENT, TO UNDERSTAND THE  
13 DOCUMENT. AND IT'S --

14 THE COURT: HOW MANY PAGES IS THE  
15 DOCUMENT?

16 MR. SOLOMON: YOUR HONOR, I DON'T KNOW,  
17 BUT I UNDERSTAND THAT. BUT THE LAW IS IF YOU -- IF  
18 YOU SIGN IT, YOU'VE INFERRED THAT YOU'VE READ IT,  
19 YOU UNDERSTOOD IT. THAT'S THE SITUATION. I'M SURE  
20 IT IS A -- YOU KNOW, I HATE TO USE THE TERM "BOILER  
21 PLATE DOCUMENT," BUT IT'S A DOCUMENT SHE USED  
22 NUMEROUS TIMES. AND THE LAW IS THAT IF YOU -- IF  
23 YOU SIGN IT, YOU'VE INFERRED THAT YOU'VE READ IT AND  
24 UNDERSTOOD IT. THAT WOULD BE THE POSITION.

25 AS TO THE TWO DOCUMENTS, EXHIBIT H AND

1 EXHIBIT I, THAT ARE ATTACHED BUT ARE NOT, FOR SOME  
2 REASON NOT INCLUDED IN HIS DECLARATION -- AND ALSO,  
3 AS THE PLAINTIFFS POINTED OUT, ARE ATTACHED TO THE  
4 REPLY, DEFENDANT'S REPLY AND DISCUSSED. THOSE  
5 DOCUMENTS ARE KNOWN. THOSE -- EVERYBODY HAS SEEN  
6 THEM. I DON'T THINK IT WOULD BE PREJUDICIAL TO ASK  
7 FOR JUDICIAL NOTICE.

8 THE COURT: WELL, HAVE YOU ASKED FOR  
9 JUDICIAL NOTICE --

10 MR. SOLOMON: I'M ASKING FOR --

11 THE COURT: -- BEFORE THIS --

12 MR. SOLOMON: I'M ASKING FOR IT NOW, YOUR  
13 HONOR.

14 THE COURT: SO IF WE WERE -- IF I WERE IN  
15 THAT SORT OF THE MODE OF MAKING YOU DO IT BY THE  
16 NUMBERS, WOULDN'T THAT REQUIRE YOU TO FILE A  
17 DOCUMENT AND FORMALLY BRING IT INTO EVIDENCE?

18 MR. SOLOMON: YOUR HONOR, UNDER THE CODE  
19 SECTION, YOU CAN DO THAT. UNDER THE CODE SECTION,  
20 WE CAN MAKE THE MOTION AT ANY TIME DURING THE  
21 HEARING OR THE TRIAL. AGAIN, THIS IS A -- THESE ARE  
22 TWO DOCUMENTS THAT SPEAK TO THE HEART OF THE ISSUE  
23 HERE. ONE IS THE TAX DOCUMENT FROM THE STATE OF  
24 MASSACHUSETTS. TO TELL YOU THE TRUTH, WHEN I  
25 REVIEWED IT, THAT WAS THE VERY FIRST DOCUMENT I

1 THOUGHT OF.

2 THE COURT: RIGHT.

3 MR. SOLOMON: WHY DON'T THEY GET THAT  
4 DOCUMENT AND JUST SHOW THIS IS A NON-PROFIT.

5 THE COURT: RIGHT.

6 MR. SOLOMON: I GUESS IN READING THE  
7 DECLARATION, I DIDN'T NOTICE. I SAW IT, DIDN'T  
8 NOTICE IT WAS INCLUDED IN THE BODY.

9 THE COURT: I MEAN, IT'S SORT OF LIKE THE  
10 LEGAL EQUIVALENT OF TAKING A ROCK AND WRAPPING THE  
11 DOCUMENT AROUND IT AND TYING IT WITH STRING AND  
12 THROWING IT THROUGH THE WINDOW. I MEAN, THAT'S --  
13 THAT'S KIND OF WHAT IT IS RIGHT NOW. IT'S IN THE  
14 COURTROOM.

15 MR. SOLOMON: IT'S IN THE COURTROOM. IT'S  
16 -- AND IT'S -- AND, AGAIN, IT'S -- I DON'T THINK IT  
17 WOULD BE PREJUDICIAL TO ANYBODY. I'M SURE THE OTHER  
18 SIDE MIGHT HAVE A DIFFERENT VIEW --

19 THE COURT: I SUSPECT THEY WILL.

20 MR. SOLOMON: -- FROM PREJUDICIAL, AS IT  
21 IS -- AGAIN, IT'S A DOCUMENT THAT WAS KNOWN. THEY  
22 REVIEWED LUKE'S DECLARATION. THEY DIDN'T -- MAYBE  
23 THEY DIDN'T OBJECT BECAUSE IT WASN'T INCLUDED. I  
24 DON'T KNOW THEIR THINKING AT THIS TIME. BUT, AGAIN,  
25 IT WAS IN THE REPLY. SO IT'S BEFORE THE COURT.

1 THOSE TWO DOCUMENTS --

2 THE COURT: BUT DOCUMENTS THAT COME IN ON  
3 REPLY -- I JUST DRAFTED A B.A.P. DECISION WHERE I  
4 SAID IT'S REVERSIBLE ERROR TO RELY ON THOSE WITHOUT  
5 ALLOWING THE OTHER SIDE AN OPPORTUNITY TO RESPOND  
6 BECAUSE -- NOW, THEY DID HAVE A SUR-REPLY. I DID  
7 ALLOW THAT. SO THAT'S A SLIGHTLY DIFFERENT  
8 SITUATION. BUT WOULDN'T IT BE MORE PRUDENT FOR ME  
9 TO REQUIRE YOU TO FILE -- TO CONTINUE THIS TO  
10 REQUIRE YOU TO FILE A REQUEST FOR JUDICIAL NOTICE,  
11 GIVE THEM AN OPPORTUNITY TO RESPOND? I'M NOT SURE  
12 I'D HAVE A HEARING IF THAT WAS THE ONLY ISSUE IF I  
13 READ THE DOCUMENTS AND UNDERSTOOD IT. BUT THAT  
14 SEEMS TO ME A MORE -- YOU KNOW, THIS IS A SUMMARY  
15 JUDGMENT YOU WANT.

16 MR. SOLOMON: I UNDERSTAND, YOUR HONOR.  
17 AND YOU'RE THE JUDGE. I'M JUST THE ATTORNEY. IF  
18 THAT'S THE JUDGE'S RULING, THAT'S THE JUDGE'S  
19 RULING. BUT AGAIN, I THINK I HAVE TO NOW AT LEAST  
20 MAKE THE ATTEMPT, TO --

21 THE COURT: SURE.

22 MR. SOLOMON: -- AVOID ANY FURTHER  
23 HEARINGS, TO GET THAT DOCUMENT IN NOW. BECAUSE I  
24 THINK THAT DOCUMENT, ALONG WITH THE OTHER DOCUMENTS  
25 THAT ARE -- THAT ARE THROUGH MR. LUKE'S DECLARATION,

1 MEET ALL THE PARAMETERS. AND THE NUMBER OF CASES  
2 THAT HAVE HELD THAT THAT IS SUFFICIENT, EVEN IN YOUR  
3 -- ON YOUR HONOR'S TENTATIVE RULING, IT'S LIKE, YOU  
4 KNOW, SIX OF ONE, HALF DOZEN OF THE OTHER, LOOKS  
5 LIKE YOU'VE GOT IT. BUT YOU DO MENTION THAT, YOU  
6 KNOW, ABOUT THE ADDITIONAL EVIDENCE. I THINK YOU'VE  
7 COUCHED YOUR LANGUAGE A LOT IN THE -- YOUR RULING AS  
8 "WE HAVE THIS, BUT WE MAY NEED THIS." THOSE ARE THE  
9 OTHER TWO DOCUMENTS I'D LIKE TO GET IN BEFORE THE  
10 COURT EITHER NOW OR HOW YOUR HONOR RULES ON THEM.

11 THE COURT: ALL RIGHT. I THINK THEY'RE  
12 CRITICAL. I DON'T THINK THE FACT THAT THE -- YOU  
13 HAVE A NUMBER OF DEALS WHERE PEOPLE HAVE SAID  
14 THINGS, BUT I DON'T KNOW -- I DON'T KNOW ANYTHING  
15 ABOUT THOSE DEALS. YOU KNOW, AGAIN, I DON'T THINK  
16 THIS IS NECESSARILY HEAVY-LIFTING HERE, BUT IF I  
17 DON'T HAVE THE DETERMINATION THAT THEY ARE A  
18 NOT-FOR-PROFIT IN THE EYES OF THE REGULATORY ENTITY  
19 IN THE -- IN THEIR ORIGINAL CORPORATE GOVERNANCE  
20 DOCUMENTS, I DON'T KNOW WHAT I HAVE.

21 SO I THINK THOSE ARE THE LINCHPIN  
22 DOCUMENTS OF YOUR ARGUMENT, AND WITHOUT THEM -- AND  
23 I DON'T THINK THEY'RE IN TODAY -- I DON'T THINK YOU  
24 HAVE ANYTHING. AND I DON'T THINK THAT THE FACT THAT  
25 THIS GUY, BASED ON BUSINESS RECORDS, SAYS, "HEY,

1 I'VE READ THESE BUSINESS RECORDS. THEY'RE NOT FOR  
2 PROFIT." I THINK THAT'S WORTH ABSOLUTELY NOTHING  
3 BECAUSE IT'S -- IT'S HIS -- YOU KNOW, IT'S BASED ON  
4 THE CONCLUSIONS OF OTHER PEOPLE. THERE'S NO  
5 EVIDENCE THAT HE WAS -- THAT HE'S LOOKED AT  
6 ANYTHING, THAT HE HAS ANY PERSONAL KNOWLEDGE. AND I  
7 UNDERSTAND BUSINESS RECORDS. HE DOESN'T HAVE TO  
8 HAVE PERSONAL KNOWLEDGE. HE CAN INTRODUCE THE  
9 RECORDS AS BUSINESS RECORDS. BUT THAT DOESN'T MEAN  
10 HE GETS TO MAKE CONCLUSIONS BASED OFF THEM. SO I  
11 THINK THAT PARAGRAPH I WOULD STRIKE.

12 MR. SOLOMON: OKAY. WOULD YOU --

13 THE COURT: I THINK IT WAS 19. WASN'T  
14 THAT 19?

15 MR. SOLOMON: PARAGRAPH 19?

16 THE COURT: OF HIS DECLARATION IS THE ONE  
17 WHERE HE JUST SAYS THEY'RE --

18 MR. SOLOMON: OH, YES. IT'S PARAGRAPH 19  
19 WHERE HE IDENTIFIES A NUMBER OF DOCUMENTS WHICH ARE  
20 ATTACHED THAT SAY "NONPROFIT." I THINK THEY'RE --

21 THE COURT: I THINK 19 IS THE ONE WHERE HE  
22 JUST SAYS IT.

23 MR. SOLOMON: YES.

24 THE COURT: YEAH, AND THEN HE GOES ON.

25 MR. SOLOMON: YEAH, INCORPORATES A 1(B),

1 (E), (F) OF THE DOCUMENTS, ALL SAY THAT IT'S A  
2 NON-PROFIT, TERI'S A NONPROFIT. TERI'S A NONPROFIT.

3 THE COURT: AND I'M WILLING TO ACCEPT THE  
4 EVIDENCE THAT THERE ARE A BUCKET OF DOCUMENTS THAT  
5 SAY THAT AND TO HAVE THAT PART OF THE DECLARATION  
6 STAND. BUT HIS CONCLUSION, I'M GIVING NO WEIGHT TO.  
7 I GUESS THAT'S THE BEST WAY TO PUT IT.

8 MR. SOLOMON: OKAY.

9 THE COURT: TO THE EXTENT HE SIMPLY READ  
10 THOSE DOCUMENTS AND SAID "A LOT OF PEOPLE SAID  
11 THAT."

12 ALL RIGHT. DO YOU WISH TO RESPOND WHILE  
13 WE'RE ON THIS ISSUE? NOW, THEIR ARGUMENT IS THAT  
14 THERE'S SOMETHING MORE, THAT -- THEY ARGUE THAT  
15 CERTAIN FACT PATTERNS -- LET'S ASSUME FOR PURPOSES  
16 OF YOUR ARGUMENT TODAY THAT YOU'RE GOING TO BE ABLE  
17 TO INTRODUCE THE DOCUMENT THAT SHOWS THAT IN THE  
18 EYES OF THE IRS AND I GUESS IT'S A STATE OF  
19 MASSACHUSETTS?

20 MR. SOLOMON: CORRECT, YOUR HONOR.

21 THE COURT: THEY ARE A NOT -- NONPROFIT.  
22 THEY'VE REGISTERED AS A NONPROFIT, THEIR CORPORATE  
23 GOVERNANCE DOCUMENTS SAY THEY'RE A NONPROFIT, AND  
24 THEY HAVEN'T BEEN DEEMED TO BE OTHERWISE BY THE  
25 TAXING ENTITIES. THEY ARGUE THAT AS A RESULT OF

1 VARIOUS BUSINESS MERGERS, WHATEVER, THAT THEY HAVE  
2 BECOME AFFILIATED WITH A FOR-PROFIT, AND THAT THAT  
3 CHANGES THE EQUATION. COULD YOU RESPOND TO THAT  
4 ARGUMENT.

5 SPEAKER 1: WELL, YOUR HONOR, THE WAY I  
6 RESPOND TO THAT IS, AGAIN, THERE ARE NUMEROUS CASES  
7 OUT THERE. THESE ISSUES HAVE BEEN RAISED. THESE  
8 ISSUES HAVE BEEN DISCUSSED. COMMENTS FROM A  
9 ELECTED-OFFICIAL ARE INCLUDED. I DON'T -- THE  
10 COURSES HAVE ALL HELD -- CASES HAVE ALL HELD THAT  
11 NOTHING HAS CHANGED. IT DOESN'T CHANGE IF THERE'S  
12 AN ECONOMIC DEAL TO IT, ECONOMIC VALUE TO IT,  
13 DOESN'T CHANGE. IT'S -- IT'S THE -- IT'S THE NATURE  
14 OF THE DEAL. IT WAS FOR -- IT WAS A STUDENT LOAN,  
15 IT WAS FOR A -- BY A FOR-PROFIT BANK, GUARANTEED BY  
16 NONPROFIT TERI FOR EDUCATIONAL PURPOSES. THAT MEETS  
17 THE PARAMETERS. THOSE OTHER ARGUMENTS THEY'RE  
18 MAKING I DON'T THINK CHANGE ANYTHING. THERE ARE,  
19 AGAIN, NUMEROUS CASES OUT THERE THAT THE COURT IS  
20 AWARE OF THAT'S BEEN CITED NUMEROUS TIMES THAT I  
21 REALLY DON'T THINK CHANGES THE COLOR OF THE  
22 TRANSACTION.

23 THE COURT: AND WHY IS THAT?

24 MR. SOLOMON: GIVE ME A SECOND HERE. YOUR  
25 HONOR, I'M SORRY, I DON'T HAVE THAT AT MY



1 FINGERTIPS.

2 THE COURT: WELL, ALL RIGHT. ALL RIGHT.

3 ALL RIGHT. SO MOVING BEYOND THE --

4 ASSUMING WE LEAP OVER THE ISSUE OF WHETHER IT WAS A  
5 NOT-FOR-PROFIT, WE GO TO THE QUESTION OF WHETHER THE  
6 GUARANTEE SATISFIES THE REQUIREMENT OF FUNDING --

7 MR. SOLOMON: CORRECT, YOUR HONOR.

8 THE COURT: -- AND COULD YOU RESPOND TO  
9 THAT ONE?

10 MR. SOLOMON: YOUR HONOR, YES. YOU ASKED  
11 FOR SOME SPECIFIC EVIDENCE OTHER THAN THE CASE LAWS.  
12 ONE OF THE DOCUMENTS THAT ARE IDENTIFIED IN MR.  
13 TERI'S -- EXCUSE ME, MR. LUKE'S DECLARATION, EXHIBIT  
14 B --

15 THE COURT: OKAY.

16 MR. SOLOMON: -- IT STATES -- THAT IS THE  
17 GUARANTEE ITSELF. THE AMENDED RESTATED GUARANTEE  
18 AGREEMENT. ABOUT TWO-THIRDS THE WAY DOWN, THERE'S A  
19 PARAGRAPH THAT SAYS "WHEREAS TERI IS IN THE BUSINESS  
20 OF PROVIDING FINANCIAL ASSISTANCE IN THE FORM OF A  
21 LOAN, GUARANTEES TO AND ON BEHALF OF STUDENTS  
22 ENROLLED IN PROGRAMS OF EDUCATION AND THEIR PARENTS  
23 AT TERI-PROVIDED SCHOOLS AND WHEREAS BANK ONE IS  
24 WILLING TO MAKE THE LOANS TO THE ELIGIBLE BUYERS --  
25 BORROWERS UNDER THE PROGRAM AND TERI IS WILLING TO

1 GUARANTEE THE PAYMENT OF PRINCIPAL IN INTEREST  
2 AGAINST THE BURROWER'S DEFAULT OR CERTAIN OTHER  
3 EVENTS OR OTHER FULLY-DESCRIBED BELOW IN ACCORDANCE  
4 WITH THE TERMS AND CONDITIONS SET FORTH IN THE  
5 AGREEMENT." THAT SHOWS INTENT THAT THE LOANS WOULD  
6 NOT BE MADE WITHOUT THE GUARANTEE. ADDITIONALLY --

7 THE COURT: IT MEANS THEY'RE UNSECURED  
8 LOANS, RIGHT?

9 MR. SOLOMON: THESE ARE UNSECURED LOANS.  
10 IN ADDITION, YOUR HONOR, IN SECTION 2 OF THAT SAME  
11 DOCUMENT, 2.1, "TERI HEREBY GUARANTEES TO BANK ONE  
12 UNCONDITIONALLY, EXCEPT AS SET FORTH IN SECTION 2  
13 BELOW, THE PAYMENT OF 100 PERCENT OF THE PRINCIPAL  
14 OF INTEREST IN -- ON THE LOANS AS TO WITH A  
15 GUARANTEE EVENT OCCURS." SO IN OTHER WORDS, AGAIN,  
16 IT WOULDN'T MAKE -- BANKS DON'T MAKE DECISIONS,  
17 DON'T GIVE OUT MONEY WITHOUT GUARANTEES NORMALLY.  
18 HERE'S A GUARANTEE OF 100 PERCENT. IT'S -- IT'S  
19 NEEDED TO ENERGIZE THE BANKS, TO INDUCE THE BANKS TO  
20 MAKE THE LOANS.

21 THE COURT: DO WE HAVE ANY EVIDENCE IN THE  
22 RECORD THAT TERI HAD THE ABILITY TO RESPOND TO THESE  
23 LOANS? I MEAN, THERE'S SOME -- THERE'S SOME  
24 REFERENCES ABOUT FEES AND DIFFERENT THINGS, BUT I  
25 DON'T REALLY -- WHAT TELLS ME HOW THIS WORKS?

1 MR. SOLOMON: IT'S KIND -- IT'S -- THE WAY  
2 IT WORKS, I WOULD THINK IT WOULD BE LIKE AN SBA  
3 LOAN. THAT WAS MY THOUGHT ABOUT HOW THIS WORKS,  
4 THAT A LENDER MAKES A LOAN TO SOMEONE WHO MAYBE NOT  
5 HAVE THE BEST CREDIT IN THE WORLD, BACKED UP BY THE  
6 SBA KNOWING. AND THE SBA SITUATION, IT'S USUALLY  
7 80 PERCENT.

8 THE COURT: RIGHT.

9 MR. SOLOMON: AND --

10 THE COURT: BUT THE -- BUT I KNOW THE SBA  
11 HAS THE MONEY BECAUSE THE SBA'S THE FEDERAL  
12 GOVERNMENT, RIGHT?

13 MR. SOLOMON: CORRECT.

14 THE COURT: ISN'T IT?

15 MR. SOLOMON: WELL, I DON'T THINK IT IS.  
16 I THINK IT'S LIKE A QUASI --

17 THE COURT: YEAH, BUT IT'S --

18 MR. SOLOMON: YES.

19 THE COURT: IT'S GOT, YOU KNOW --

20 MR. SOLOMON: IT'S THOUGHT OF AS THE  
21 GOVERNMENT, CORRECT.

22 THE COURT: RIGHT. SO WHAT -- LET'S --  
23 WHAT TELLS ME -- WHAT TELLS ME -- AGAIN, I'M NOT  
24 LOOKING AT CASE LAW. I'M LOOKING AT THIS IN  
25 ISOLATION UNDER THE FACTS OF THIS CASE. IS THERE

1 ANYTHING IN THE RECORD THAT SAYS, "OKAY, I'VE GOT A  
2 TERI GUARANTEE, I'VE GOT EVIDENCE THAT THEY WOULDN'T  
3 MAKE THE LOAN BUT FOR THE TERI GUARANTEE THAT" --  
4 AND AT THE TIME, I KNOW THAT TERI HAD FINANCIAL  
5 PROBLEMS LATER. I'M NOT --

6 MR. SOLOMON: CORRECT.

7 THE COURT: -- WORRIED ABOUT THAT. I'M  
8 WORRIED ABOUT -- AND I'M WORRIED ABOUT -- MR. BUSH,  
9 YOU'LL TRY AND TALK ME OUT OF IT, BUT I AGREE WITH  
10 YOU THAT IT'S PROGRAMMATIC FUNDING, NOT FUNDING FOR  
11 THIS LOAN, SO -- SO THE GUARANTEE -- BUT I THINK WE  
12 COULD AGREE THAT THE GUARANTEE HAS TO HAVE SOME  
13 SUBSTANCE. IT CAN'T JUST BE -- I CAN'T GO OUT AND  
14 FORM THE CELERY COOPERATIVE, YOU KNOW, A  
15 NOT-FOR-PROFIT THAT BENEFITS PEOPLE WHO EAT CELERY  
16 AND GUARANTEE YOUR LOAN KNOWING THAT I HAVE NO  
17 MONEY. YOU KNOW, I MEAN, I'M USING A -- THEY'RE  
18 LAUGHING -- I'M USING A SILLY EXAMPLE, BUT I THINK  
19 YOU GET MY POINT.

20 MR. SOLOMON: WELL, IT'S INDEMNIFICATION,  
21 CAN BE THE SAME WAY.

22 THE COURT: RIGHT. IT'S GOT TO -- IT'S  
23 GOT TO BE REAL.

24 MR. SOLOMON: YES.

25 THE COURT: SO WHAT IN THE RECORD TELLS ME

1 THAT THIS IS REAL OR WHAT -- WHAT CAN I -- YOU KNOW,  
2 THAT THIS IS A REAL THING. AND AGAIN, I KNOW  
3 THERE'S A LOT OF CASE LAW, AND I KNOW THERE'S A LOT  
4 OF JUDGES BASED IN THE RECORD BEFORE THEM, BUT I  
5 DON'T KNOW THAT THEY DIDN'T HAVE A DECLARATION THAT  
6 DIDN'T EXPLAIN MORE ABOUT TERI. I REALLY DON'T KNOW  
7 ANYTHING ABOUT TERI.

8 MR. SOLOMON: YOUR HONOR, I -- I CAN'T  
9 COMMENT ON THAT. I DON'T KNOW MYSELF. IT'S NEVER  
10 BEEN RAISED AS AN ISSUE, SO IT HASN'T BEEN RESPONDED  
11 TO.

12 THE COURT: RIGHT.

13 MR. SOLOMON: BUT I DON'T HAVE THAT  
14 INFORMATION OTHER THAN IT'S A COMPANY THAT'S -- IT  
15 WAS FORMED UNDER A SPECIFIC LOAN SITUATION AND  
16 PROGRAM.

17 THE COURT: IS -- DO I HAVE THAT EVIDENCE  
18 IN THE RECORD?

19 MR. SOLOMON: I THINK --

20 THE COURT: I MEAN, I'VE GONE THROUGH  
21 THIS, BUT THIS IS A MASSIVE MOTION.

22 MR. SOLOMON: YES.

23 THE COURT: I'LL BE PERFECTLY HONEST. AND  
24 AS WE KNOW ALL KNOW, THERE'S A FEW THINGS GOING ON  
25 RIGHT NOW, SO I'M A LITTLE DISTRACTED. BUT I

1 COULDN'T FIND -- YOU KNOW, I'M TRYING TO UNDERSTAND  
2 AND NOT DO INTERNET RESEARCH WHICH I'M -- BETWEEN  
3 THE FOUR OF US --

4 MR. SOLOMON: RIGHT.

5 THE COURT: -- I'M REALLY NOT SUPPOSED TO  
6 DO. SO WHAT ON THIS RECORD --

7 MR. SOLOMON: IT WAS -- IT WAS -- IT'S  
8 MADE THROUGH THE EDUCATION ONE CONTINUING EDUCATION  
9 PROGRAM.

10 THE COURT: RIGHT. I GOT THAT.

11 MR. SOLOMON: OKAY.

12 THE COURT: THAT'S THE PROGRAM. SO THAT  
13 --

14 MR. SOLOMON: RIGHT.

15 THE COURT: THAT GIVES US THE PROGRAMMATIC  
16 HOOK WHICH I -- I THINK --

17 MR. SOLOMON: RIGHT.

18 THE COURT: AGAIN, MR. BUSH CAN ARGUE TO  
19 THE CONTRARY, BUT I THINK THAT -- I THINK YOU GOT  
20 THAT ONE.

21 MR. SOLOMON: AND THE PROGRAM -- THE  
22 TERI -- THE EDUCATION RESOURCE INSTITUTE WAS  
23 PROBABLY SET UP -- AGAIN, I DON'T HAVE ANYTHING TO  
24 GUARANTEE, SO TO INDUCE THE LENDERS TO MAKE THE  
25 LOANS. I DON'T HAVE THE HISTORY OF THAT PROGRAM

1 BEFORE ME OR BEFORE THE COURT, AND I'D HATE TO JUST  
2 SHOOT IN THE DARK AND MAKE COMMENTS BECAUSE --

3 THE COURT: WELL, YOU SHOULD --

4 MR. SOLOMON: -- I DON'T KNOW.

5 THE COURT: BUT IS THAT SOMETHING -- IF  
6 THAT WERE AN INFIRMITY OF THE RECORD, IS IT ONE YOU  
7 THINK YOU COULD CORRECT?

8 MR. SOLOMON: I WOULD HAVE TO TALK TO MY  
9 CO-COUNSEL.

10 THE COURT: OKAY.

11 MR. SOLOMON: WHO, AS YOU PROBABLY HAD  
12 NOTICED, HAS BEEN COUNSEL ON A NUMBER OF THESE  
13 CASES.

14 THE COURT: RIGHT.

15 MR. SOLOMON: SO HOPEFULLY IF THAT  
16 QUESTION'S COME UP BEFORE, THEY CAN ANSWER IT.

17 THE COURT: OKAY.

18 MR. SOLOMON: BUT I -- AGAIN, I DON'T HAVE  
19 THAT IN FRONT OF ME. I --

20 THE COURT: OKAY.

21 MR. SOLOMON: -- CAN'T COMMENT ON THAT.

22 THE COURT: ALL RIGHT. THANK YOU.

23 ALL RIGHT.

24 MR. SOLOMON: OH, AND ALSO, JUST ONE OTHER  
25 THING. JUST AS TO THE FUNDING, EXHIBIT F WHICH IS

1 THE DEPOSIT AND SECURITY AGREEMENT TO MR. LUKE'S  
2 DECLARATION STATES "WHEREAS THE OWNER IS WILLING TO  
3 PURCHASE EDUCATION LOANS TO BURROWERS UNDER THE  
4 EDUCATION LOAN PROGRAM LISTED ON SCHEDULE A,  
5 ATTACHED THERETO, AND OTHERS IN ACCORDANCE WITH THE  
6 INDEMNITY COLLECTIVELY STUDENT LOAN AGREEMENT UPON  
7 CERTAIN TERMS AND CONDITIONS, INCLUDING BUT NOT  
8 LIMITED TO THE GUARANTEE OF THE PAYMENT."

9 THE COURT: OKAY.

10 MR. SOLOMON: SO THE GUARANTEE IS THE  
11 FUNDING. WITHOUT THE GUARANTEE, THERE WOULD BE NO  
12 FUNDING, YOUR HONOR.

13 THE COURT: ALL RIGHT. AND NO ONE -- THIS  
14 LENDER WOULD NOT BE IN THIS MARKET MAKING UNSECURED  
15 LOANS TO THESE PEOPLE, PEOPLE LIKE THE DEBTOR AND  
16 THE ABSENCE OF THE GUARANTEE WHICH COULD BE ONE OF  
17 TWO THINGS, THE GUARANTEE -- AND THIS IS REALLY MY  
18 QUESTION. THE GUARANTEE ITSELF HAS FINANCIAL MERIT  
19 OR THE GUARANTEE GETS THEM A NONDISCHARGEABLE LOAN,  
20 AND DOES IT HAVE TO BE BOTH, OR CAN IT BE EITHER?

21 MR. SOLOMON: WELL --

22 THE COURT: I THINK IT HAS TO BE BOTH --

23 MR. SOLOMON: OKAY.

24 THE COURT: -- PERSONALLY.

25 MR. SOLOMON: TO A LENDER, I WOULD -- I



1 DON'T THINK, AGAIN, BANK ONE OR J.P. MORGAN ARE JUST  
2 THROWING THEIR MONEY OUT THERE. THEY'RE  
3 SOPHISTICATED COMPANIES, I GUESS. YEAH.

4 THE COURT: I'M -- I'M -- I'M -- THE  
5 RECORD CAN REFLECT I'M MAKING A FACE BECAUSE I WAS A  
6 JUDGE HERE IN 2008. I SAW A LOT OF LOANS WHERE  
7 PEOPLE WERE THROWING MONEY AT PEOPLE, SO --

8 MR. SOLOMON: OKAY. I STAND CORRECTED.  
9 BUT THEY SHOULD HAVE -- I WOULD THINK IN OUR  
10 POSITION, WE'RE JUST SAYING IT MEETS THE 523(A)(8).  
11 IF YOUR HONOR WANTS MORE INFORMATION REGARDING THE  
12 RELIABILITY OF TERI OR THE VIABILITY OF TERI --

13 THE COURT: I DON'T KNOW THAT IT'S A LOT,  
14 I JUST DON'T THINK I HAVE ANYTHING.

15 MR. SOLOMON: OKAY.

16 THE COURT: YOU KNOW, IT'S -- IT'S --  
17 IT'S-- I GET IT. I'M STRUGGLING WITH WHETHER  
18 IT'S -- IT'S -- IT'S -- AND STRUGGLING IS THE  
19 CORRECT VERB -- WITH WHETHER IT'S ENOUGH THAT THEY  
20 SIMPLY DESIRE THE GUARANTEE OR WHETHER THERE HAS TO  
21 BE SOMETHING THAT, AT A MINIMUM, SHOWS THAT TERI WAS  
22 CAPABLE OF RESPONDING TO THE GUARANTEE AT THAT TIME  
23 OR HAD EVER PAID ON A GUARANTEE. AND THERE'S  
24 CERTAINLY CASE LAW WHERE TERI IS THE DEFENDANT WHICH  
25 SUGGESTS TO ME THAT TERI HAS PAID ON A GUARANTEE.

1 SO I'M NOT SURE WHETHER THAT'S ENOUGH OR WHERE  
2 THERE'S ENOUGH EVIDENCE. I'LL TALK TO MR. BUSH  
3 ABOUT THAT. THAT -- THAT'S -- THAT ONE'S -- BUT I  
4 -- BUT I DO THINK IT'S GOT TO BE REAL. I DO THINK  
5 THAT A MERE FACIAL GUARANTEE PROBABLY DOESN'T GET  
6 YOU OVER THE MARK, BUT IF THE GUARANTEE IS MADE BY A  
7 NONPROFIT, THAT NONPROFIT HAS THE ABILITY TO RESPOND  
8 AS EVIDENCED BY EVIDENCE OF FUNDS AVAILABLE OR  
9 EVIDENCED BY HAVING RESPONDED INTO THE PROGRAM IN  
10 FACT. I JUST DON'T KNOW THAT I HAVE THAT EVIDENCE.

11 MR. SOLOMON: I WOULD JUST -- IT JUST --  
12 IN MY OWN EXPERIENCE, YOUR HONOR, I DEAL WITH  
13 GUARANTEES ALL THE TIME, BANKS' GUARANTEES. AND --  
14 I'LL WITHDRAW IT.

15 THE COURT: BECAUSE THIS IS DIFFERENT.

16 MR. SOLOMON: YEAH.

17 THE COURT: IT'S NOT A CREDIT ENHANCEMENT.  
18 IT'S NOT THE NORMAL CREDIT ENHANCEMENT THAT WOULD BE  
19 THE BROTHER OF OUR BORROWER GIVING A GUARANTEE  
20 BECAUSE SHE LACKS FINANCIAL --

21 MR. SOLOMON: RIGHT.

22 THE COURT: -- VIGOR. IT'S -- IT'S --  
23 IT'S A -- IT'S A CREDIT ENHANCEMENT ON THE OTHER  
24 SIDE OF THE LEDGER WHICH IS STILL VALUABLE. IT'S  
25 STILL A GUARANTEE. BUT IT ALSO COMES WITH THIS

1 NON-DISCHARGEABILITY LINK TO IT. AND SO THAT'S WHAT  
2 I -- SO I THINK, AGAIN, IT'S -- I DON'T SAY THE  
3 GUARANTEE IS -- IF THEY MAKE A MISTAKE ON THEIR  
4 UNDERWRITING AND IT'S THE BROTHER, THAT'S THEIR  
5 MISTAKE, BUT I AM MORE CONCERNED WHEN IT'S ON THE  
6 OTHER SIDE OF THE LEDGER THAT IT BE REAL.

7 MR. SOLOMON: SO IS YOUR HONOR EXPANDING  
8 523(A)(B)? BECAUSE I DON'T -- THERE'S NOTHING IN --

9 THE COURT: WELL, IT'S GOT TO BE A -- IT'S  
10 GOT TO BE -- IF WE'RE GOING TO MAKE A GUARANTEE  
11 FUNDING -- AND THERE'S OTHER PORTIONS OF THE STATUTE  
12 THAT SAY "FUNDING AND GUARANTEE." IF IT -- IF IT  
13 HAD SAID THAT, THEN I THINK IT WOULD BE EASIER TO  
14 SAY "JUST PROVIDE THE GUARANTEE." BUT IT DOESN'T.  
15 SO I THINK THE GUARANTEE HAS TO BE THE EQUIVALENT OF  
16 FUNDING. FOR IT TO BE THE EQUIVALENT OF FUNDING, I  
17 THINK IT'S GOT TO HAVE SOMETHING OTHER THAN THE NAME  
18 ON IT.

19 MR. SOLOMON: OKAY.

20 THE COURT: DO YOU SEE WHAT I'M SAYING?

21 MR. SOLOMON: YEAH. PG EQUALS FUNDING,  
22 EQUALS CAPACITY.

23 THE COURT: RIGHT. EXACTLY.

24 MR. SOLOMON: OKAY.

25 THE COURT: YOU KNOW, SO -- SO I DON'T

1 KNOW THAT I NEED COMPLICATED FINANCIAL THINGS.  
2 AGAIN, I -- IF THEY HAVE FUNDED, I THINK THAT'S  
3 ENOUGH. IF YOU CAN YOU MAKE THAT ARGUMENT OR  
4 PROVIDE THAT EVIDENCE, OR IF AT THE TIME, YOU KNOW,  
5 IT'S THE PROGRAM, SO -- BUT I DON'T HAVE ANYTHING  
6 FROM TERI OR ANYBODY SAYING THEY'VE -- YOU KNOW,  
7 YOU'RE SAYING THEY SAID THEY WOULD. COULD THEY OR  
8 DID THEY?

9 MR. SOLOMON: UNDERSTOOD, YOUR HONOR.

10 THE COURT: AND I JUST THINK THAT'S -- IF  
11 WE'RE GOING TO DOT OUR "I'S" AND CROSS OUR "T'S"  
12 WHICH, AS YOU CAN TELL, WE'RE GOING TO DO --

13 MR. SOLOMON: RIGHT. IT LOOKS LIKE IT.

14 THE COURT: -- THEN I THINK THAT'S A --  
15 MAYBE A PIECE OF EVIDENCE, AND I MIGHT WELL GIVE YOU  
16 TIME TO THINK ABOUT IT AND TO PROVIDE THAT.

17 MR. SOLOMON: OKAY.

18 THE COURT: IF YOU CAN. BECAUSE I  
19 PERSONALLY THINK THAT IT'S PROBABLY OUT THERE. I  
20 JUST AM NOT SURE -- I DON'T THINK I'VE HEARD ARGUED  
21 TODAY AND I DON'T THINK IN THE EVIDENCE BEFORE ME IS  
22 ANYTHING THAT -- I'M SUPPOSED TO ASSUME THAT.

23 MR. SOLOMON: OKAY.

24 THE COURT: IT'S SUMMARY JUDGMENT. YOU  
25 HAVE THE BURDEN.

1 MR. SOLOMON: I UNDERSTAND THAT, YOUR  
2 HONOR.

3 THE COURT: I DON'T GET TO ASSUME.

4 MR. SOLOMON: RIGHT.

5 THE COURT: THAT'S WEIGHING.

6 MR. SOLOMON: RIGHT.

7 THE COURT: AND THAT'S WEIGHING  
8 SUPPOSITION WHICH IS A PARTICULARLY BAD IDEA.

9 MR. SOLOMON: SO YOU'RE SEEING AS A  
10 MATERIAL FACT THE CAPACITY OF TERI --

11 THE COURT: WHERE THERE IS A MATERIAL  
12 FACT, THIS GUARANTEE WAS THE EQUIVALENT TO FUNDING  
13 BECAUSE THE ENTITY HAD THE FINANCIAL CAPABILITY TO  
14 BACK IT AT THE TIME AT SOME POINT IN THE PROGRAM.  
15 AND AGAIN, PROGRAMMATIC -- NOT THIS LOAN -- OR THIS  
16 ENTITY HAD. DID TERI EVER PAY ON A GUARANTEE? I'M  
17 SURE IT DID --

18 MR. SOLOMON: OKAY.

19 THE COURT: -- IF IT'S REAL. YOU KNOW,  
20 AND YOU'RE CERTAINLY NOT HERE TELLING ME THAT YOU  
21 DON'T THINK IT'S REAL. I JUST DON'T HAVE THAT  
22 EVIDENCE.

23 MR. SOLOMON: OKAY. UNDERSTOOD, YOUR  
24 HONOR.

25 THE COURT: AND I THINK THAT'S -- IF WE'RE

1 GOING THROUGH IT AND REALLY CHECKING THE BOXES, THEN  
2 I GET OVER MY CONCERN. BECAUSE I DO HAVE SOME  
3 CONCERN -- IF I WERE GOING BACK IN TIME AND LOOKING  
4 AT THE STATUTORY LANGUAGE, THE FACT THAT IN ONE  
5 PLACE IT SAYS -- YOU KNOW, OR SAID OR SAYS, YOU  
6 KNOW, "FUNDING AND GUARANTEE" AND ANOTHER IT JUST  
7 SAYS "FUNDING," WE'RE TAUGHT TO SAY "WHY IS THAT  
8 DIFFERENT." AND AGAIN, BECAUSE OF THAT DIFFERENCE,  
9 I DON'T THINK IT MEANS -- THEY CAN TRY AND TALK ME  
10 OUT OF IT -- I DON'T THINK IT MEANS A GUARANTEE  
11 ISN'T FUNDING. I JUST THINK IT MEANS SOMETHING  
12 DIFFERENT THAN JUST GIVING YOU THE DOCUMENT.

13 MR. SOLOMON: UNDERSTOOD, YOUR HONOR.

14 THE COURT: SO I DON'T THINK IT'S  
15 NECESSARILY A HIGH HURDLE, BUT MAYBE IT'S A HURDLE.

16 THEN THE OTHER ONE IS "INSTITUTION NEED  
17 NOT BE AN EDUCATIONAL INSTITUTION." AND I DON'T  
18 KNOW THAT YOU NEED TO ARGUE THAT BECAUSE I THINK  
19 THAT'S THE ISSUE THAT THEY HAVE TO TRY AND TALK ME  
20 OUT OF. I HAVE THE GREATEST OF RESPECT FOR JUDGE  
21 PERAIS WHO I THINK IS ONE OF THE FIRST PEOPLE TO SAY  
22 "NO, CONGRESS WROTE THAT LANGUAGE OUT. WE'RE NOT  
23 GOING TO READ IT BACK IN." SO DO YOU HAVE ANYTHING  
24 TO ADD TO THAT ARGUMENT?

25 MR. SOLOMON: NO, YOUR HONOR, I DON'T.

1 THE COURT: OKAY.

2 MR. SOLOMON: THAT ONE, I'M FINE WITH.

3 THE COURT: YEAH, I BET YOU ARE. IS THERE  
4 ANYTHING ELSE IN MY TENTATIVE BEFORE THEY ARGUE THAT  
5 YOU FOUND PROBLEMATIC?

6 MR. SOLOMON: NO, YOUR HONOR. LET'S SEE  
7 WHAT THEY BRING UP AND THEN HOW THE COURT RULES --

8 THE COURT: ALL RIGHT.

9 MR. SOLOMON: -- WHAT ADDITIONAL THINGS IT  
10 MAY NEED.

11 THE COURT: ALL RIGHT. THANK YOU VERY  
12 MUCH.

13 MR. SOLOMON: THANK YOU, YOUR HONOR.

14 THE COURT: ALL RIGHT. MR. BUSH.

15 MR. BUSH: GOOD MORNING, YOUR HONOR. IT  
16 SEEMS AS THOUGH YOU'RE -- YOU'RE IN A VERY  
17 QUESTIONING MOOD. IF YOU WOULD LIKE --

18 THE COURT: OH, YEAH.

19 MR. BUSH: -- TO TAKE THE LEAD OF WHERE  
20 YOU WANT TO GO --

21 THE COURT: WELL, I USUALLY DO, SO --

22 MR. BUSH: -- I THINK WE'RE OKAY WITH  
23 THAT.

24 THE COURT: WELL, IT'S -- I GUESS THE  
25 FIRST QUESTION, THEY DON'T DISAGREE THAT THEY HAVE

1 THE BURDEN, AND THEY DON'T -- AND I'M NOT INCLINED  
2 TO PENALIZE THEM FURTHER THAN WITH MY QUESTIONING.  
3 I AM WAGGING FINGER ON THE LOCAL RULES,  
4 NON-COMPLIANCE, BUT -- AND SO I THINK WE CAN -- I  
5 DON'T REALLY NEED TO HEAR MORE ON THAT. I DID GIVE  
6 YOU THE CHANCE FOR SUR-REPLY, AND THAT'S THE MAIN  
7 REASON I'M NOT GOING TO -- I THINK IT WOULD BE  
8 UNDULY PUNITIVE TO REQUIRE THEM TO GO BACK AND REDO  
9 THIS. AND, FRANKLY, YOU FILED SO MUCH PAPER, I  
10 CAN'T SEE -- EVEN IF ALL I -- YOU HAD TO DO IS COPY  
11 IT AGAIN, THAT WOULDN'T BE A GOOD THING. SO I THINK  
12 --

13 MR. SMITH: YOUR HONOR, IF I MIGHT JUST  
14 ADD ONE THING ON THAT?

15 THE COURT: YEAH.

16 MR. SMITH: TO THE EXTENT THAT THEY ARE  
17 GOING TO SUBMIT THE IRS LETTER AND THE STATE FILING  
18 FROM MASSACHUSETTS, I WOULD JUST POINT OUT THAT ALL  
19 THEY'VE SUBMITTED IS THE 1985 ARTICLES OF  
20 ORGANIZATION. THERE ARE AMENDED ARTICLES ON THE --

21 THE COURT: WELL, THE WAY THAT THIS WILL  
22 WORK --

23 MR. SMITH: YEAH.

24 THE COURT: -- IS THEY WILL HAVE -- I  
25 THINK I'M PROBABLY GOING TO REQUIRE THEM TO AUGMENT



1 THE EVIDENTIARY RECORD. I DON'T THINK IT'S  
2 SUFFICIENT. BUT I'LL BE CANDID WITH YOU. I THINK  
3 THEY CAN. AND YOU WILL HAVE A CHANCE TO RESPOND.

4 MR. SMITH: THANK YOU, YOUR HONOR.

5 THE COURT: AND THEY WILL HAVE A CHANCE  
6 TO -- YOU KNOW, AT SOME POINT --

7 MR. SMITH: OF COURSE.

8 THE COURT: WE'RE NOT EVEN NEAR A  
9 DISCOVERY CUT-OFF. WE'RE NOT EVEN NEAR A  
10 DISPOSITIVE -- I HAVEN'T EVEN SET A DISPOSITIVE  
11 MOTION CUT-OFF I DON'T THINK. SO I WOULD -- IT JUST  
12 DOESN'T MAKE ANY SENSE FOR ME TO DENY THE MOTION  
13 WITHOUT PREJUDICE. I THINK WE JUST USE THIS PROCESS  
14 --

15 MR. SMITH: THAT'S FINE. YEAH,  
16 ABSOLUTELY.

17 THE COURT: AND SO ON THAT, YOU CAN ARGUE  
18 THAT THAT ISN'T ENOUGH NOW, YOU CAN ARGUE THAT THAT  
19 ISN'T ENOUGH LATER, BUT --

20 MR. SMITH: OF COURSE.

21 THE COURT: -- I'M AWARE THAT YOU'RE GOING  
22 TO GET A CHANCE TO LOB SOMETHING INTO -- TO RESPOND  
23 TO THEIR NEW EVIDENCE.

24 MR. SMITH: THANK YOU, YOUR HONOR.

25 THE COURT: ALL RIGHT. SO LET'S GO

1 THROUGH THE -- LET'S GO WITH THE ONES THAT I -- I  
2 JUST CAN'T SEE YOU CONVINCING ME OTHERWISE, AND LET  
3 ME GIVE YOU A CHANCE.

4 THE FIRST IS THAT THE INSTITUTION HAS TO  
5 BE AN EDUCATIONAL INSTITUTION OR A GOVERNMENT  
6 ENTITY. AND AGAIN, JUDGE PARIS, IN HER DECISION  
7 BACK IN THE DAY, SAID, YOU KNOW -- AND THIS IS A  
8 JUDGE WHO'S EXTREMELY SYMPATHETIC TO STUDENT LOAN  
9 CASES. I MEAN, SHE RETIRED AND WHAT SHE WANTED TO  
10 DO WAS DO PRO BONO STUDENT LOAN CASES. SO WE'RE NOT  
11 TALKING ABOUT SOMEBODY WHO IS UNSYMPATHETIC TO  
12 STUDENT LOAN DEBTORS. I START FROM THAT PREMISE. I  
13 KNOW THAT FROM PERSONAL KNOWLEDGE. YET SHE'S  
14 LOOKING AT THIS AS A STATUTORY MATTER AND SAYING,  
15 "WAIT A MINUTE. CONGRESS WROTE THAT LANGUAGE OUT."  
16 AND MANY OF THE COURTS SINCE THEN HAVE POINTED OUT  
17 -- WE ALL KNOW CONGRESS HAS NARROW, NARROW, NARROW  
18 NARROWED THE ABILITY TO DISCHARGE STUDENT LOANS. SO  
19 WHAT IS THE ARGUMENT THAT I GET TO ADD THAT BACK IN?  
20 I JUST DON'T SEE IT.

21 MR. SMITH: WELL, YOUR HONOR, I WOULD SAY  
22 TWO THINGS IN RESPONSE TO JUDGE PARIS' OPINION IN  
23 ROSEN -- IS IT ROSEN?

24 THE COURT: I THINK.

25 MR. SMITH: NUMBER ONE, WE DID CITE

1 LEGISLATIVE HISTORY THAT I -- IT SEEMS PRETTY CLEAR  
2 TO ME ON PAGE --

3 MR. BUSH: PAGE 10.

4 MR. SMITH: -- PAGE 10 OF OUR RESPONSE. I  
5 UNDERSTAND IF IT'S NOT PERSUASIVE TO THE COURT, BUT  
6 AT LEAST IT IS SOMETHING THAT I DON'T BELIEVE ROSEN  
7 EXAMINED.

8 THE OTHER THING I WOULD SAY ABOUT ROSEN IS  
9 I -- ROSEN -- YOU KNOW, I DON'T KNOW IF ROSEN  
10 SURVIVED KASHIKAR, ALTHOUGH THERE WAS NO HOLDING  
11 THAT THE LOAN WAS AN EDUCATIONAL BENEFIT. THE  
12 ANALYSIS WAS THAT HAD THE DEBTOR RECEIVED THE FUNDS,  
13 IT WOULD HAVE BEEN. SO I DO THINK THAT THERE IS A  
14 QUESTION ABOUT THE ANALYSIS IN ROSEN SUCH THAT THE  
15 NINTH CIRCUIT B.A.P. HAS REMOVED ONE OF THE -- YOU  
16 KNOW, ANALYTICAL PREDICATES UPON WHICH THE CASE  
17 PROCEEDS. AND SO I THINK THAT THAT IS SOMETHING.

18 THE OTHER THING I WOULD SAY ABOUT THE  
19 CONTINUED EXPANSION OF 523(A)(8) IS THAT I DON'T  
20 UNDERSTAND THE ARGUMENT THAT BECAUSE CONGRESS HAS  
21 MADE IT BIGGER THAT MEANS EVERY TERM WITHIN IT GETS  
22 BIGGER. YOU KNOW, THE FIRST AMENDMENT DOESN'T GET  
23 BIGGER WHEN YOU ADD THE 12TH AMENDMENT.

24 THE COURT: NO, BUT IN THIS CASE THEY MADE  
25 IT BIGGER BY MAKING IT SMALLER.

1 MR. SMITH: BY REMOVING THAT WORD.

2 THE COURT: RIGHT.

3 MR. SMITH: THAT'S CORRECT. AND I  
4 GUESS -- AND WHAT I WOULD SAY IS THAT WE ARE NOT  
5 SAYING TO READ BACK IN "HIGHER EDUCATION," BUT  
6 "INSTITUTION" -- AND IF I HAD -- COULD I HAVE A  
7 MINUTE TO TALK ABOUT THE RODRIGUEZ CASE? I THINK  
8 THAT THERE IS A GREAT DEAL OF AMBIGUITY IN THAT  
9 WORD. AND SOME OF THE CASES THAT HAVE TRIED TO  
10 DEFINE IT, I HAVE SAID IT'S CRYSTAL CLEAR WHAT AN  
11 INSTITUTION IS, AND THEN EQUATED IT WITH BASICALLY  
12 ANYTHING. I MEAN, IT COULD BE A BANK, IT COULD BE A  
13 PRISON, IT COULD BE A STREET GANG. YOU KNOW, ANY --  
14 ANY THING THAT DOES SOMETHING ELSE IS NOW AN  
15 INSTITUTION. I THINK THAT THAT IS NOT A NARROW  
16 CONSTRUCTION WHICH I BELIEVE THE TENTATIVE OPINION  
17 BEGINS WITH "WE ARE GOING TO CONSTRUE THIS  
18 NARROWLY." RODRIGUEZ, YOU KNOW, FOR EXAMPLE --

19 THE COURT: THAT'S JUDGE WILLIAMSON'S  
20 CASE?

21 MR. SMITH: YES, YOUR HONOR. SAYS THE  
22 COURT WILL APPLY THE PLAIN EVERYDAY DICTIONARY  
23 MEANING OF INSTITUTION, TAKES MERRIAM WEBSTER WHICH  
24 SAYS "AN ESTABLISHED ORGANIZATION OR CORPORATION AS  
25 A COLLEGE OR UNIVERSITY, ESPECIALLY OF A PUBLIC

1 NATURE." THE NEXT SENTENCE THE COURT SAYS, "BECAUSE  
2 523(A) (8) WAS EXPANDED IN 1984 TO REMOVE THE WORDS  
3 OF HIGHER EDUCATION, THIS COURT CONCLUDES THAT A  
4 CORPORATION IS INCLUDED IN THE TERM INSTITUTION."

5 SO THE DICTIONARY DEFINITION IS NOW BEING  
6 CHANGED BY THE LEGISLATIVE HISTORY WHICH I DON'T  
7 THINK IS AN APPROPRIATE WAY TO DEFINE A TERM THAN IN  
8 THOSE EXIST INDEPENDENTLY OF EACH OTHER. THE COURT  
9 THEN SAYS --

10 THE COURT: BUT DON'T WE ASSUME -- I MEAN,  
11 LET'S TALK ABOUT LEGISLATIVE HISTORY, AND LET'S TALK  
12 ABOUT STATUTORY CONSTRUCTION.

13 MR. SMITH: OKAY.

14 THE COURT: THIS HAS BEEN THE LAW --  
15 INSTITUTION HAS BEEN SO DEFINED FOR PURPOSES OF THE  
16 CASE LAW FOR HOW LONG?

17 MR. SMITH: THIRTY FIVE, FORTY YEARS.

18 THE COURT: AND DON'T WE PRESUME THAT  
19 CONGRESS KNOWS -- I MEAN, I THINK WE CAN ALL SIT  
20 HERE AND SAY WE'RE QUITE SURE THAT AN INDIVIDUAL  
21 CONGRESSMAN DOESN'T KNOW EVERYTHING THE COURTS DO.

22 MR. SMITH: OF COURSE.

23 THE COURT: AND THEY CERTAINLY DON'T KNOW  
24 WHAT LAURA TAYLOR DOES IN HER COURTROOM. BUT WE GOT  
25 CIRCUIT COURTS DOING THIS, TOO. SO, I MEAN, THESE

1 --

2 MR. SMITH: THAT'S ABSOLUTELY FAIR, EXCEPT  
3 I WOULD POINT OUT THE CASE WE CITED IN THE SUR-REPLY  
4 ABOUT HARDISON WHERE THE SUPREME COURT -- WHICH  
5 DEFINED THE TERM UNDUE HARDSHIP IN 1977 AND NOW IS  
6 SAYING, "YOU KNOW WHAT, THAT WAS COMPLETELY WRONG."  
7 IT HAS BEEN -- CONGRESS HAS NEVER CHANGED IT. AND  
8 THE SUPREME COURT IS NOW SAYING, "YOU KNOW WHAT, WE  
9 WENT BACK AND READ THE BRIEFS, AND THAT DOESN'T MAKE  
10 ANY SENSE."

11 THE COURT: WELL, AND OH HAPPY DAY IF THE  
12 SUPREME COURT WOULD CHANGE THE LAW. BUT IT HASN'T,  
13 YOU KNOW, AND --

14 MR. SMITH: BUT JUST TO THE POINT THAT --  
15 I MEAN, IF THE SUPREME COURT CAN SAY THAT THERE ARE  
16 TIMES WHEN YOU HAVE TO RE-EXAMINE A STATUTE -- I  
17 MEAN, AGAIN, EDUCATIONAL BENEFIT WAS DETERMINED --  
18 WAS -- FOR 30 YEARS SAID "NO STUDENT LOAN CAN EVER  
19 BE DISCHARGED WITHOUT UNDUE HARDSHIP." IN THE LAST  
20 THREE YEARS, THE FIFTH CIRCUIT, THE NINTH CIRCUIT  
21 B.A.P. HAVE ALL CONCLUDED, AND QUITE SORT OF  
22 SNIPPILY, "WHY WOULD ANYONE HAVE EVER THOUGHT THAT?"

23 THE COURT: WELL, I THINK THAT THE LOANS  
24 IN THOSE CASES, THOUGH, WERE -- WERE --

25 MR. SMITH: I THINK THEY'RE VERY SIMILAR

1 TO THIS LOAN. THEY WERE -- THEY WERE -- THEY WERE  
2 VERY HIGH-INTEREST DEBTS THAT DIDN'T FIT ANYWHERE IN  
3 THE STATUTE, AND THE COURT SAID, "WELL, THEY'RE JUST  
4 EDUCATIONAL BENEFITS BECAUSE THEY WERE FOR SCHOOL."  
5 AND NOW THE JURISPRUDENCE HAS SAID "WAIT A SECOND.  
6 THAT CAN'T BE RIGHT." AND I WOULD RESPECTFULLY  
7 SUBMIT THAT THIS IS THE SAME STATUTORY PROVISION, IN  
8 FACT, AND --

9 THE COURT: BUT WE'RE TALKING ABOUT A  
10 DIFFERENT -- YOU'RE TALKING ABOUT A DIFFERENT -- A  
11 DIFFERENT PART OF THE STATUTE, AND I'M TALKING ABOUT  
12 THE INSTITUTION, THAT NARROW -- THAT NARROW PIECE  
13 HERE. AND --

14 MR. SMITH: OF COURSE. AND, I'M SORRY, I  
15 WAS JUST RESPONDING TO THE LARGER POINT ABOUT IF  
16 ONCE A CASE HAS BEEN DECIDED AND CONGRESS DOESN'T  
17 SAY ANYTHING, ISN'T IT PRESUMED THAT'S CORRECT.

18 THE COURT: I DON'T THINK IT -- CONGRESS  
19 IS PRESUMED TO KNOW THE COMMON LAW.

20 MR. SMITH: OF COURSE.

21 THE COURT: AND, YOU KNOW, THIS ISN'T  
22 NECESSARILY COMMON LAW IN THE TYPICAL SENSE OF, YOU  
23 KNOW, THE STATUTE OF FIRST ELIZABETH OR WHATEVER.

24 MR. SMITH: RIGHT.

25 THE COURT: BUT IT'S -- IT -- IT IS THE

1 ROUTINE DAY-TO-DAY PRACTICE OF THE COURTS, AND I'M  
2 JUST NOT INCLINED TO FIND THAT CONGRESS, WHATEVER,  
3 YOU KNOW, WITHOUT SOMETHING VERY DIRECT, VERY  
4 SPECIFIC, THAT WHEN IT LIMITED THIS BY TAKING OUT  
5 THIS LANGUAGE, THAT IT STILL INTENDED A BROADER  
6 DEFINITION.

7 MR. SMITH: OF COURSE.

8 THE COURT: I THINK THAT'S -- I DON'T  
9 THINK YOUR ARGUMENT IS FRIVOLOUS, BUT I'M -- I'M NOT  
10 GOING TO --

11 MR. SMITH: UNDERSTOOD.

12 THE COURT: I'M NOT BUYING WHAT YOU'RE  
13 SELLING ON THAT ONE. MR. BUSH.

14 MR. BUSH: IF I MAY JUST ADD, IF THE --  
15 IT'S NOT AS THOUGH WE'RE NOT PROPOSING THAT THERE IS  
16 A REASONABLE AND SPECIFIC DEFINITION THAT CONGRESS  
17 DID INTEND. WHAT WE'RE SAYING IS THAT WHEN (A) (8)  
18 WAS WRITTEN AND USED THE WORD "INSTITUTION," IT WAS  
19 WRITTEN IN REFERENCE TO THE HIGHER EDUCATION ACT  
20 WHICH HAD A VERY EXPLICIT DEFINITION OF INSTITUTION  
21 AS DEFINED UNDER 34 CFR 668.1 WHICH WE CITED ON  
22 PAGE 11 OF OUR ORIGINAL BRIEF. SO WHAT WE ARE  
23 SAYING IS THAT AT ONE POINT "INSTITUTION OF HIGHER  
24 EDUCATION" LIMITED -- THE "OF HIGHER EDUCATION" WAS  
25 LIMITING THE WORD "INSTITUTION." BY ELIMINATING



1 THOSE PHRASES, THEY WERE GOING BACK TO MERELY  
2 "INSTITUTION," BUT THAT WORD DOES STILL HAVE A MUCH  
3 MORE LIMITED DEFINITION GIVEN THIS CONTEXT AND GIVEN  
4 THE LEGISLATIVE HISTORY.

5 THE COURT: UNDERSTOOD. BUT I -- AGAIN, I  
6 THINK THE PRACTICE FOR DECADES IS WHAT IT IS. THE  
7 UNDERSTANDING FOR DECADES IS WHAT IT IS, AND THE  
8 CASE LAW FOR DECADES IS WHAT IT IS. AND I'M NOT  
9 INCLINED TO DECIDE FOR YOU ON THAT ISSUE. THAT  
10 DOESN'T MEAN YOU CAN'T TAKE ME UP AND, YOU KNOW --

11 MR. SMITH: UNDERSTOOD.

12 THE COURT: -- GET SOMEBODY ELSE TO --

13 MR. SMITH: UNDERSTOOD.

14 THE COURT: -- TO CHANGE IT. I THINK  
15 THAT'S SOMETHING THAT'S GOING TO HAVE TO BE DECIDED  
16 AT THE CIRCUIT LEVEL, TO BE -- TO BE BLUNT. SO I  
17 THINK THAT'S -- IT'S NOT PROFITABLE FOR US TO  
18 CONTINUE --

19 MR. SMITH: UNDERSTOOD.

20 THE COURT: -- ARGUING THAT ONE. SO AS  
21 YOU CAN TELL, ON THE ISSUE OF GOING TO NONPROFIT  
22 INSTITUTION, I'M INCLINED TO REQUIRE THAT A FORMAL  
23 REQUEST FOR JUDICIAL NOTICE BE FILED ON THE  
24 DOCUMENTS THAT I THINK ARE THE TWO MOST IMPORTANT  
25 DOCUMENTS IN THE EVIDENTIARY SUBMISSION. I DON'T

1 BUY THAT -- I SUSTAIN YOUR EVIDENTIARY OBJECTION TO  
2 THE EXTENT YOU'RE SAYING THIS GENTLEMAN DOESN'T HAVE  
3 PERSONAL KNOWLEDGE TO GIVE A STATEMENT OF FACT THAT  
4 IT'S A NOT-FOR-PROFIT, AND HE CERTAINLY IS NOT  
5 DISINTERESTED ENOUGH THAT HE CAN QUALIFY AS AN -- HE  
6 DOESN'T EVEN TRY TO QUALIFY AS AN EXPERT WHO'S  
7 ENTITLED TO GIVE AN OPINION.

8 THE OTHER DOCUMENTS ARE, YOU KNOW,  
9 SUPPORTIVE THAT THAT WAS THE GENERAL UNDERSTANDING  
10 IN THE COMMUNITY. AND THAT'S NOT NOTHING, BUT  
11 THAT'S AS MUCH AS I'M GOING TO TAKE HIM FOR. BUT I  
12 THINK IF THEY GET THE -- THE -- YOU KNOW, THE -- IF  
13 YOUR ARGUMENT IS THERE ARE OTHER ARTICLES OF  
14 INCORPORATION AND THEY SAY SOMETHING DIFFERENT, THEN  
15 OBVIOUSLY THAT'S A PROBLEM FOR THEM AND GOOD FOR  
16 YOU. BUT THEY'RE GOING TO PUT IN, I ASSUME,  
17 WHATEVER IS THERE THAT SHOWS THAT THEY WERE AND THEY  
18 -- AT THE RELEVANT TIME, IF THEY WERE FORMED IN '85  
19 AS A NONPROFIT AND THEY AMENDED THEIR ARTICLES OF  
20 INCORPORATION, THAT THEY NEVER AMENDED THEM TO  
21 CHANGE THAT QUALITY OF THE -- OF THE ENTITY, AT  
22 LEAST UP TO THE TIME THAT THIS LOAN WAS MADE, WHICH  
23 I THINK IS THE RELEVANT POINT IN TIME. DO WE AGREE  
24 ON THAT?

25 I MEAN, IF THEY BECAME A FOR-PROFIT, YOU

1 KNOW, TODAY, IT WOULDN'T MATTER FOR -- TO ME FOR  
2 PURPOSES OF THIS LOAN. THEY'VE GOT TO HAVE BEEN A  
3 NON-PROFIT AT THE TIME THEY FUNDED THE PROGRAM AND  
4 AT THE TIME -- PROBABLY AT THE TIME THIS LOAN WAS  
5 MADE. BUT -- BUT I'M -- I DON'T WANT TO ARGUE THAT  
6 BECAUSE THAT EVIDENCE ISN'T IN FRONT OF ME.

7 MR. SMITH: UNDERSTOOD, YOUR HONOR. AND I  
8 -- I THINK THAT THAT -- THAT THAT'S CERTAINLY  
9 CORRECT. I WOULD -- I WOULD -- CAN I -- IF I COULD  
10 ADD ONE THING ABOUT THAT.

11 THE COURT: SURE.

12 MR. SMITH: I THINK THAT THOSE DOCUMENTS  
13 ACTUALLY SAY A LOT OF VERY INTERESTING THINGS. YOU  
14 KNOW, THERE ARE -- YOU KNOW, I THINK I'VE NOW READ  
15 THEM ALL. I MEAN, THERE'S TENS OF THOUSANDS OF  
16 PAGES OF THIS STUFF.

17 THE COURT: RIGHT.

18 MR. SMITH: AND, YOU KNOW, FOR EXAMPLE --

19 THE COURT: OH, JOY.

20 MR. SMITH: -- THE DEPOSIT AND SECURITY  
21 AGREEMENT HAD TERI ASSIGN TITLE TO ALL ITS BANK  
22 ACCOUNTS AND DEFAULTED DEBTS SUCH THAT I DON'T KNOW  
23 HOW IT CAN CONTINUE TO EXIST AS A BONA FIDE  
24 GUARANTOR IF IT HAS ASSIGNED ALL ABILITY TO MANAGE  
25 ITS GUARANTEE PORTFOLIO TO ANOTHER ENTITY. I MEAN,

1 YOU'RE -- AT SOME POINT YOU CEASE TO BE A GUARANTOR  
2 IN ANY REAL SENSE OF THE WORD. AND SO WHILE THERE  
3 IS -- YOU KNOW, ALL OF THESE DOCUMENTS SAY IT'S A  
4 NONPROFIT. WHEN YOU ACTUALLY TRACE ALL OF THE  
5 CONTRACTS THAT ARE INCORPORATED BY REFERENCE, YOU  
6 FINALLY GET TO A SITUATION WHERE IT IS JUST ON  
7 PAPER. THERE IS NO ACTUAL ARRANGEMENT WHEREBY THE  
8 PURPOSE OF THE STATUTE, I WOULD SAY, WHERE A ACTUAL  
9 BONA FIDE NONPROFIT WAS GUARANTEEING A DEBT TO  
10 ENSURE THE INTEREST RATE. THAT -- THAT IS WHAT THE  
11 IRS TRACKS.

12 AND I WOULD ALSO SAY, CONTRARY TO  
13 COUNSEL'S ARGUMENT, J.P. MORGAN WAS MAKING ALL SORTS  
14 OF LOANS EXACTLY LIKE THIS FOR STUDENTS WITHOUT A  
15 TERI GUARANTEE. I DO NOT BELIEVE THAT THESE  
16 DOCUMENTS SHOW THERE'S A BUT-FOR CAUSE THAT WITHOUT  
17 THE TERI GUARANTEE, NO ONE WOULD MAKE IT.

18 THE COURT: WELL, YOU KNOW, THAT -- YOU  
19 KNOW, IF I HAD WANTED -- AND I DIDN'T. I WROTE  
20 CHECKS FOR MY SON'S EDUCATION. BUT IF I HAD WANTED  
21 AN UNSECURED LOAN FROM MY BANK, I COULD HAVE GOTTEN  
22 ONE BECAUSE I HAVE GOOD CREDIT AND I HAVE A  
23 LONG-STANDING HISTORY WITH THE BANK. I DON'T KNOW  
24 THAT I COULD HAVE GOTTEN AN UNSECURED ONE. I BET I  
25 COULD. BUT IF I COULDN'T, I COULD HAVE GOTTEN A

1 LOAN SECURED BY MY HOME WHICH HAD EQUITY OR, YOU  
2 KNOW -- YOU KNOW, SO THE FACT THAT THEY'RE LENDING  
3 TO OTHER PEOPLE -- IT'S SORT OF THE COMMENT I WAS  
4 MAKING TO COUNSEL. I DON'T KNOW WHY PEOPLE MADE  
5 THOSE OTHER LOANS.

6 MR. SMITH: WELL, BUT I THINK THE -- BUT  
7 THE ARGUMENT --

8 THE COURT: THIS IS THE ONLY ONE THAT  
9 MATTERS.

10 MR. SMITH: I -- WELL I WOULD RESPECTFULLY  
11 SAY, YOUR HONOR, THAT IF THEIR CLAIM IS THAT THIS IS  
12 EVIDENCE THAT THESE LOANS WOULD NOT HAVE BEEN MADE  
13 EXCEPT FOR TERI, YOU CAN COMPARE THE TERMS BETWEEN  
14 J.P. MORGAN'S PRIVATE EDUCATION LOANS THAT DID NOT  
15 HAVE A TERI GUARANTEE THAT HAVE THE IDENTICAL CREDIT  
16 TERMS, SAME INTEREST RATES BASED ON CREDIT SCORE.  
17 AND SO I DO THINK THAT THAT AT LEAST CALLS INTO  
18 QUESTION WHETHER OR NOT THIS WAS --

19 THE COURT: BUT THAT ISN'T THE STANDARD,  
20 IS IT? WHERE DOES THE STATUTE SAY IT HAS TO BE -- I  
21 MEAN, WE UNDERSTAND THE PURPOSE OF THE STATUTE, AT  
22 LEAST I DO. BUT THAT'S NOT THE WAY CONGRESS WROTE  
23 IT. IT'S NOT THAT --

24 MR. SMITH: OH, I'M SORRY. I AGREE. BUT  
25 THE ARGUMENT UP HERE WAS THAT YOU HAVE DEMONSTRATED

1 A BUT-FOR CLAUSE, THAT WITHOUT TERI'S GUARANTEE TO  
2 GET TO FUNDING -- AND I -- AND I WAS JUST CALLING TO  
3 QUESTION THAT CONCLUSION.

4 THE COURT: I'M NOT SURE -- I -- HE MAY  
5 HAVE SAID THAT AND HE MAY HAVE ARGUED THAT, BUT I  
6 DON'T KNOW THAT THAT'S -- I MEAN, THAT'S SORT OF THE  
7 BIG -- THAT --

8 MR. SMITH: OKAY. UNDERSTOOD.

9 THE COURT: -- THAT IN CONGRESS' MIND --  
10 BUT THEY DIDN'T DRAFT THE LEGISLATION THAT WAY.  
11 THEY'RE TRYING TO DRIVE SOMETHING BIGGER TO GET MORE  
12 MONEY INTO EDUCATION.

13 MR. SMITH: I UNDERSTAND. BUT THEN --

14 THE COURT: SO I DON'T KNOW.

15 MR. SMITH: BUT I -- IT BECOMES DIFFICULT  
16 WHEN NOW WE'RE TALKING ABOUT THE BIGGER PICTURE, BUT  
17 WE CAN'T TALK ABOUT THE DEFINITION OF THE WORDS  
18 BECAUSE THAT'S ALREADY OVER.

19 THE COURT: OH, YOU CAN TALK ABOUT  
20 WHATEVER YOU WANT. I'M JUST TELLING YOU WHAT I'M  
21 BUYING AND WHAT I'M NOT.

22 MR. SMITH: OKAY.

23 THE COURT: YOU KNOW, I MEAN, I DON'T -- I  
24 JUST -- I THINK YOU'RE -- YOU'RE --

25 MR. SMITH: WE CAN MOVE ON TO OTHER --

1 THE COURT: YEAH. WELL, MR. BUSH.

2 MR. BUSH: IF I MAY INTERJECT, I THINK  
3 WHAT WE'RE TRYING TO UNDERSTAND HERE IS THAT CLEARLY  
4 THE STATUTE CLEARLY DIFFERENTIATES GUARANTEEING AND  
5 FUNDING. THE STATUTE EXPLICITLY STATES -- USES THE  
6 WORD "GUARANTEED" IN REFERENCE TO GOVERNMENT ONLY.  
7 AND IF CONGRESS INTENDED GUARANTEEING A LOAN TO LEAD  
8 TO NON-DISCHARGEABILITY FOR ANY OTHER KIND OF  
9 ENTITY, THEN IT COULD HAVE USED THAT WORD BUT IT  
10 DIDN'T. IT USED THE WORD "GUARANTEE" EXPLICITLY AND  
11 ONLY FOR GOVERNMENT UNITS. AND SO FUNDING CANNOT  
12 POSSIBLY MERELY MEAN GUARANTEEING. IT -- THEY CAN'T  
13 BE THE SAME.

14 THE COURT: WELL, AND THAT'S -- THAT'S  
15 SORT OF MY COMMENT TO OPPOSING COUNSEL, IS I DON'T  
16 DISAGREE WITH THAT, BUT I THINK FOR A GUARANTEE TO  
17 BE THE FUNCTIONAL EQUIVALENT OF FUNDING, IT'S GOT TO  
18 BE SOMETHING OTHER THAN A MERE SIGNATURE ON A PIECE  
19 OF PAPER. THEY HAVE TO HAVE HAD THE ABILITY TO  
20 FUND, THEY HAVE TO HAVE ACTUALLY FUNDED. AND IF HE  
21 CAN ESTABLISH THAT, THEN I, FOR ONE, AM SATISFIED,  
22 AND I'M PROBABLY GOING TO MAKE HIM PROVIDE SOME  
23 PROOF OF THAT.

24 MR. BUSH: AND IF I MAY TO CLARIFY, TOO,  
25 THEN. AND THEN WHAT WE BELIEVE WE CAN PROVIDE

1 EVIDENCE FOR IS THAT DUE TO THE ASSIGNMENT OF THESE  
2 CONTRACTS, THERE WAS NEVER -- IT WAS NEVER TERI THAT  
3 WOULD HAVE BEEN PERFORMING UNDER ANY OF THESE  
4 GUARANTEES, THAT WOULD HAVE EVER BEEN DOING ANY  
5 FUNDING. THEY WERE MERELY A MIDDLE MAN.

6 THE COURT: WHETHER IT'S TERI OR A  
7 SUCCESSOR IN INTEREST, I DON'T THINK IT MATTERS THE  
8 WAY THE STATUTE'S STRUCTURED, BUT YOU CAN CERTAINLY  
9 MAKE THAT ARGUMENT ONCE THE EVIDENCE IS PROVIDED.  
10 THAT -- YOU KNOW, I MEAN, YOU WANT TO UNPACK THESE  
11 IN A WAY -- AND I UNDERSTAND WHAT YOU'RE DOING, AND  
12 I THINK IT'S -- I THINK IT'S CLEVER AND CREATIVE,  
13 BUT I JUST DON'T THINK THAT THE STATUTE IS PRETTY --  
14 I THINK, AGAIN, I BUY THE ARGUMENT THAT -- TO SOME  
15 LEVEL THAT BECAUSE "GUARANTEE" ISN'T USED EXPRESSLY  
16 IN THE PART OF THE STATUTE THAT WE'RE TALKING ABOUT,  
17 THAT THERE'S GOT TO BE SOME SUPER STRUCTURE AROUND  
18 IT. AND I -- IT CAN'T BE -- YOU CAN'T SET UP A  
19 STRAW MAN IN THE SENSE OF NO ABILITY. BUT WHETHER  
20 THAT ENTITY GETS ITS MONEY FROM SOMEBODY ELSE OR  
21 WHETHER THAT ENTITY, HAVING THE ABILITY TO DO IT HAS  
22 THEN ASSIGNED IT OUT, I THINK THEN YOU'RE ASKING ME  
23 TO GO TOO FAR AFIELD FROM THE -- FROM THE STATUTE.  
24 SO I'M WILLING TO AT LEAST CONSIDER THE ARGUMENT AND  
25 TO DO SOMETHING WITH IT, BUT I DON'T THINK I'LL TAKE



1 IT AS FAR AS YOU WANT ME TO AT THE END OF THE DAY IF  
2 THEY CAN PROVIDE THAT EVIDENCE WHICH I SUSPECT THEY  
3 CAN.

4 MR. SMITH: I -- YOUR HONOR, AND I  
5 COMPLETELY UNDERSTAND THAT. I THINK THAT -- FOR  
6 EXAMPLE, I THINK THE COURT CITED TO GREER-ALLEN  
7 FAVORABLY, AND I WOULD -- I WOULD JUST LIKE TO QUOTE  
8 FROM GREER-ALLEN COMPARED TO THE WAY HE QUOTED THE  
9 -- WHICH IS THE EXACT SAME GUARANTEE AGREEMENT, BY  
10 THE WAY. WE HAVE THE SAME GUARANTEE AGREEMENT. IT  
11 WAS FILED UNDER SEAL IN GREER-ALLEN HERE. AND I  
12 BELIEVE THE COURT, YOU KNOW, USED AN ELLIPSIS TO  
13 REMOVE THE CONDITIONAL ELEMENT OF THIS WHICH IS A --  
14 LET ME JUST READ IT. THE COURT QUOTES "TERI HEREBY  
15 GUARANTEES TO BANK ONE UNCONDITIONALLY," ELLIPSIS,  
16 "THE PAYMENT OF 100 PERCENT OF THE PRINCIPAL OF  
17 ACCRUED INTEREST ON EVERY LOAN TO WHICH A GUARANTEE  
18 EVENT HAS OCCURRED. THE SWEEPING BREADTH OF THIS  
19 GUARANTEE SHOWS THAT BANK ONE AND J.P. MORGAN KNEW  
20 THAT ALL LOANS ISSUED UNDER THE PROGRAM WOULD BE  
21 GUARANTEED BY TERI IN THE EVENT OF DEFAULT."

22 NOW, THE ELLIPSIS SAYS -- ONE SECOND.  
23 "EXCEPT" -- OH, HERE IT IS. "UNCONDITIONALLY,  
24 EXCEPT AS SET FORTH IN SECTION 2.2 BELOW" WHICH I  
25 THINK IS A PRETTY SERIOUS EXCEPT NEXT TO THE WORD

1 UNCONDITIONALLY. IF YOU READ SECTION 2.2, THERE ARE  
2 A HOST OF REQUIREMENTS THAT HAD TO BE MET, OTHERWISE  
3 TERI HAD NO CONTRACTUAL DUTY TO PERFORM ON THE  
4 GUARANTEE.

5 WHEN YOU READ THE O'BRIEN CASE AND THE  
6 MERCHANT CASE FROM THE SIXTH CIRCUIT, THE EVIDENCE  
7 IN THE RECORD WAS THAT THE NONPROFIT HAD PERFORMED  
8 ON THE GUARANTEE SUCH THAT THAT'S ONE OF THE REASONS  
9 THEY SAID WE CAN AGREE TO THIS LEGAL FICTION, I  
10 WOULD CALL, THAT GUARANTEE EQUALS FUNDING BECAUSE  
11 THEY DID FUND THE LOAN WHEN THEY PERFORMED ON THE  
12 GUARANTEE.

13 THE COURT: WELL, YOU WANT -- BUT AGAIN,  
14 IT DOESN'T SAY "FUND THE LOAN," IT SAYS "FUND THE  
15 PROGRAM."

16 MR. SMITH: AND I KNOW THAT WE'RE NOT  
17 GOING TO WIN THESE ARGUMENTS, BUT I -- I DON'T KNOW  
18 WHY, AS A MATTER OF GRAMMAR, THAT'S TRUE JUST  
19 BECAUSE THE TWO WORDS ARE NEXT TO EACH OTHER.

20 THE COURT: OH, ARE WE -- ARE WE GOING TO  
21 SAY THAT CONGRESS IS THE GRAMMAR POLICE? I MEAN,  
22 COME ON. HAVE YOU READ THE B.A.P. SEPA AMENDMENTS?  
23 I MEAN --

24 MR. SMITH: WELL, NO. NO --

25 THE COURT: -- THEY'LL -- WE GOT THINGS WE

1 WOULD HAVE TO REFER TO AS THE HANGING PARAGRAPH  
2 BECAUSE THEY COULDN'T BE BOTHERED TO SEPARATELY  
3 NUMBER THEM. SO I -- I DON'T -- I DON'T NECESSARILY  
4 WANT TO GET INTO -- THAT'S THE COMMON UNDERSTANDING  
5 OF IT.

6 MR. SMITH: NO. NO. BUT WHY DOESN'T IT  
7 MODIFY LOAN FUNDING?

8 THE COURT: EXCUSE ME?

9 MR. SMITH: "EDUCATIONAL LOAN MADE UNDER  
10 ANY PROGRAM FUNDED," AND PEOPLE SAY "WELL, FUNDED  
11 AND PROGRAM MUST GO TOGETHER." BUT THE TYPICAL  
12 STRUCTURE OF THAT SENTENCE SUCH AS "THE ORDER MADE  
13 UNDER RULE 56 WAS GRANTED," NO ONE THINKS THAT  
14 "GRANTED" MODIFIES "RULE 56." IT MODIFIES THE  
15 SUBJECT.

16 THE COURT: THERE'S SOME COMMAS MISSING  
17 FROM THE GRAMMATICAL -- I DISAGREE WITH YOU.  
18 INTERESTINGLY ENOUGH, I HAD A DISCUSSION ABOUT  
19 GRAMMAR LAST NIGHT AT A BOOK CLUB MEETING, SO I'M --  
20 I'M -- YOU KNOW, THE BOOK WE READ WAS THE  
21 GRAMMARIAN, SO I'M -- I GOT YOU ON THIS. BUT, NO, I  
22 DON'T AGREE WITH THAT. I THINK THAT -- AGAIN, THE  
23 COMMON UNDERSTANDING IN ALL THE CASES -- THERE'S NO  
24 CASE THAT YOU'VE CITED OR THAT HAS EVER FOUND THAT  
25 IT'S GOT TO BE -- THERE ARE CASES WHERE IT DID

1 RELATE TO THE LOAN, BUT THERE'S NONE THAT FOUND THAT  
2 THAT -- THAT PROGRAMMATIC FUNDING WASN'T SUFFICIENT,  
3 IS THERE?

4 MR. SMITH: I MEAN, IT -- YOUR HONOR, I  
5 WOULD JUST SUBMIT THAT THOSE ARE TWO DIFFERENT  
6 QUESTIONS. WHETHER THERE'S A CASE AND WHETHER IT'S  
7 A MATTER OF GRAMMAR, IT'S CORRECT.

8 THE COURT: WELL, I -- OKAY. LET'S FORGET  
9 THE GRAMMAR FOR A MINUTE. IS THERE ANY CASE THAT'S  
10 -- THAT SUPPORTS THE VIEW YOU JUST EXPRESSED?

11 MR. SMITH: I MEAN --

12 THE COURT: DIRECTLY.

13 MR. SMITH: NO.

14 THE COURT: OKAY. I --

15 MR. SMITH: WE CAN MOVE ON.

16 THE COURT: THERE IS A -- THERE IS A LONG  
17 HISTORY HERE. AND WHILE I THINK YOU CAN TELL, I'M  
18 NOT GIVING HIM NECESSARILY -- OR GIVING THE MOVANT  
19 NECESSARILY THE BENEFIT OF THE DOUBT THAT JUST  
20 BECAUSE -- I'M NOT DOING THE LEMMING THING, JUST  
21 BECAUSE EVERYBODY ELSE DID IT, I'M DOING IT. I'M  
22 TRYING TO BE FAIR WITH YOU AND THINK ABOUT IT  
23 INDEPENDENTLY. BUT THERE IS A SUPER STRUCTURE OF  
24 CASE LAW THAT I AM OPERATING WITHIN AND THAT I FIND  
25 COMPELLING.

1 MR. SMITH: UNDERSTOOD.

2 THE COURT: THESE ARE JUDGES WHO IN MANY  
3 CASES I KNOW, I RESPECT. I'M NOT SURE I WOULD BE  
4 QUITE AS -- WELL, I'M NOT GOING TO EVEN SAY THAT,  
5 BUT --

6 MR. SMITH: UNDERSTOOD.

7 THE COURT: YOU KNOW, SO I -- I'VE READ  
8 THE CASE LAW. THEIR REASONING HOLDS TOGETHER ON  
9 THESE ISSUES.

10 MR. SMITH: OKAY.

11 THE COURT: LET'S GO TO -- SO I THINK  
12 WE'VE SORT OF COVERED THEM IN THE SENSE THAT I THINK  
13 YOU ARE CORRECT IN ASKING FOR A GREATER QUALITY OF  
14 EVIDENCE, AND I THINK THAT I'M GOING TO ASK THEM TO  
15 DO THAT FOR TODAY. MY INCLINATION WOULD BE TO  
16 REQUIRE THEM TO FILE THAT EVIDENCE, TO GIVE YOU A  
17 CHANCE TO RESPOND, AND THEN TO INDEPENDENTLY MAKE A  
18 DECISION WHETHER WE HAVE MORE ORAL ARGUMENT. I  
19 DON'T THINK I'M GOING TO NECESSARILY NEED IT,  
20 DEPENDING ON WHAT THEY PROVIDE AND WHAT YOUR  
21 RESPONSE IS.

22 MR. SMITH: YES, YOUR HONOR.

23 THE COURT: SO WITH THAT, IS THERE  
24 ANYTHING ELSE THAT -- ASSUMING THAT I WILL BE TAKING  
25 IT UNDER SUBMISSION AFTER THEY PROVIDE THIS

1 ADDITIONAL EVIDENCE AND YOU PROVIDE YOUR RESPONSE,  
2 IS THERE ANYTHING ELSE YOU'D LIKE ME TO PARTICULARLY  
3 FOCUS ON?

4 MR. SMITH: THE ONLY OTHER THING I WOULD  
5 -- IF WE COULD TALK FOR A SECOND ABOUT IS THAT IT  
6 SEEMED -- THE TENTATIVE OPINION DID SEEM TO CITE  
7 ZIMMERMAN FAVORABLY, AND I JUST WANT TO TALK A  
8 LITTLE BIT MORE ABOUT ZIMMERMAN BECAUSE I DO THINK  
9 THAT ZIMMERMAN AND RODRIGUEZ IN THIS RESPECT ARE IN  
10 CONFLICT.

11 THE COURT: OKAY.

12 MR. SMITH: THE DISTRICT COURT IN  
13 ZIMMERMAN, I MEAN, SAID NEARLY THE EXACT SAME THING  
14 THAT RODRIGUEZ SAID, WAS THAT "WE'RE NOT DOING THAT.  
15 WE'RE NOT -- WE'RE NOT WASTING THE COURT'S TIME WITH  
16 THIS CRAZY IDEA OF LOOKING BEHIND THE FORM." AND  
17 THE FIRST SURROGATE SAID, "YES, YOU ARE. THAT IS  
18 WHAT YOU HAVE TO DO WHEN CONGRESS DOESN'T FIND  
19 NONPROFIT AS A 501(C)(3)" --

20 THE REPORTER: I'M SORRY --

21 MR. SMITH: I'M SORRY.

22 THE REPORTER: -- CAN YOU MOVE THAT  
23 MICROPHONE OVER.

24 MR. SMITH: BUT FURTHER -- AND I KNOW THE  
25 COURT NOTED THAT THE DISTINCTION WAS THAT THAT WAS

1 ON MOTION TO DISMISS. AND THERE ARE -- THERE ARE  
2 ACTUALLY FIVE ZIMMERMAN OPINIONS. IT ALSO WENT TO  
3 SUMMARY JUDGMENT. AND AT SUMMARY JUDGMENT, THE  
4 DISTRICT COURT SAID "WE HAVE BEEN INSTRUCTED BY THE  
5 FIRST CIRCUIT TO EXAMINE THIS. WE HAVE FOUND THAT  
6 THE FOR-PROFIT COMPANY USED THE NON-PROFIT TO  
7 EXTRACT \$14 MILLION THROUGH THIS TAX-EXEMPT ENTITY  
8 AND THAT THERE HAD BEEN A COMMINGLING OF ASSETS AND  
9 EMPLOYEES SUCH THAT THE FOR-PROFIT WAS" --

10 THE COURT: DO YOU HAVE EVIDENCE THAT THAT  
11 HAS HAPPENED IN THIS CASE? I MEAN, THIS ONE'S BEEN  
12 THROUGH BANKRUPTCY. WHAT -- WHAT'S YOUR EVIDENCE  
13 THAT --

14 MR. SMITH: WELL, IT --

15 THE COURT: I MEAN, YOU HAVE TO -- I'M --  
16 I --

17 MR. SMITH: I UNDERSTAND.

18 THE COURT: I'VE CRITICIZED THE QUALITY OF  
19 THEIR EVIDENCE IN SOME MINOR RESPECTS, BUT ONCE THEY  
20 BRING THAT IN, WHAT DO YOU HAVE?

21 MR. SMITH: WE HAVE THEIR TAX RECORDS THAT  
22 SHOW THAT \$400 MILLION WAS -- WENT FROM A TAX-EXEMPT  
23 ENTITY FROM A PUBLICLY-TRADED CORPORATION, AND THE  
24 -- THAT IN THEIR TAX RECORDS THEY SAID NOTHING OF  
25 THIS HAPPENED. AND IF YOU LOOK AT THE ACCOMPANYING

1 FINANCIAL STATEMENTS, IT DID HAPPEN. IF YOU COMPARE  
2 THAT TO THE ACTUAL RECORD IN ZIMMERMAN, IT'S -- THE  
3 EVIDENCE IS JUST AS GOOD. AND THE ZIMMERMAN  
4 PLAINTIFFS GOT SUMMARY JUDGMENT ON THAT BECAUSE THE  
5 COURT SAID "THIS IS INDICATIVE OF SOME SUSPECT  
6 TRANSACTIONS AND THAT'S ENOUGH."

7 THE COURT: BUT THE TAXING ENTITIES HAVE  
8 NOT -- HAVE NOT --

9 MR. SMITH: AND NOR HAD THE TAXING  
10 ENTITIES IN ANY OF THOSE CASES. THAT'S WHAT THE  
11 COURT SAID, IS THAT THESE ARE TWO DIFFERENT  
12 QUESTIONS.

13 THE COURT: BUT I DON'T THINK -- I DON'T  
14 -- WELL, AGAIN, I UNDERSTAND YOUR ARGUMENT. I  
15 UNDERSTAND YOUR ARGUMENT.

16 MR. SMITH: AND ACTUALLY, YOU KNOW, I DO  
17 HAVE RECORDS WHERE WHEN TERI WAS ULTIMATELY SOLD TO  
18 THE MASSACHUSETTS STUDENT ASSISTANCE AUTHORITY, IN  
19 THE CONTRACT IT SAYS, "TERI'S REGULATORY AND AUDIT  
20 ISSUES AS IDENTIFIED ON THE SCHEDULE 2.5 UNDER SEAL"  
21 -- THAT WE CAN'T FIND. OTHER THAN THAT, WE DON'T  
22 HAVE ANY PROBLEMS. I MEAN, I GENUINELY THINK -- I'M  
23 NOT ASKING FOR SUMMARY JUDGMENT ON ANY OF THESE  
24 ISSUES, BUT I THINK THAT THE -- THEIR TAX RECORDS  
25 COMBINED WITH A NUMBER OF OTHER STATEMENTS AND THEIR



1 ARTICLES, THEIR AMENDED ARTICLES OF ORGANIZATION  
2 THAT SAY THAT "THE DIRECTORS AND OFFICERS CAN ACT  
3 FOR A PERSONAL BENEFIT WITHOUT BEING VIOLATIVE OF  
4 THE UNDERLYING 501(C)(3) CHARTER," AND THEN FURTHER  
5 EXTENDS, "TOTAL IMMUNITY FROM ANY CIVIL OR CRIMINAL  
6 LIABILITY THAT CAN NEVER BE WITHDRAWN ABSENT CONSENT  
7 OF THE INTERESTED DIRECTOR." AND I UNDERSTAND SOME  
8 OF THIS IS BOILERPLATE LANGUAGE IN -- BUT FOR A  
9 CHARITY TO SAY THAT, WHEN YOU COMPARE IT TO EVERY  
10 OTHER CHARITY AT THAT TIME THAT DOESN'T HAVE ANY OF  
11 THAT LANGUAGE, I -- I GENUINELY THINK THAT DOES  
12 RAISE A QUESTION THAT IS SUITABLE FOR A TRIAL. I  
13 HAVE DEPOSED A NUMBER OF TERI EXECUTIVES -- NOT IN  
14 THIS CASE -- BUT I WOULD CERTAINLY CALL THEM TO  
15 TRIAL WERE IT TO COME TO THAT. AND I THINK THAT --  
16 I -- RESPECTFULLY, I DO THINK THAT AT LEAST AS A  
17 QUESTION OF FACT -- AND THIS IS NOT JUST MY  
18 SPECULATION. I MEAN, IF THE COURT DOESN'T AGREE  
19 WITH THE STATEMENTS THAT I HAVE IDENTIFIED HERE, I  
20 CAN UNDERSTAND THAT. BUT I RESPECTFULLY DO BELIEVE  
21 THAT IF THE COURT AGREES THAT THERE IS MAYBE SOME  
22 INCONSISTENCIES IN THE SORT OF ACCOUNTING GOING ON,  
23 JUST AS A QUESTION OF FACT THAT COULD BE FURTHER  
24 DEVELOPED AT TRIAL AND IN DISCOVERY, I RESPECTFULLY  
25 BELIEVE THAT WE HAVE MET THAT.

1 THE COURT: OKAY.

2 MR. SMITH: THAT'S ALL.

3 THE COURT: UNDERSTOOD. ALL RIGHT. THANK  
4 YOU.

5 MR. SMITH: THANK YOU.

6 THE COURT: ALL RIGHT. ANY RESPONSE FROM  
7 THE MOVANT?

8 MR. SOLOMON: NO, NOT AT THIS TIME, YOUR  
9 HONOR. I THINK IT'S PRETTY CLEAR WHAT THE COURT  
10 WANTS TO DO. I WOULD JUST LIKE DIRECTION AS TO  
11 TIME.

12 THE COURT: SURE. WELL, THAT --

13 MR. SOLOMON: AND, ALSO, WILL THE -- YOUR  
14 COURT'S RULING ON THIS SPECIFICALLY OUTLINE WHAT YOU  
15 WANT OR IS IT --

16 THE COURT: WELL, YEAH, I'M GOING TO GIVE  
17 YOU AN ORAL RULING NOW.

18 MR. SOLOMON: OKAY.

19 THE COURT: IF YOU NEED A SCHEDULING  
20 ORDER, I CAN CERTAINLY PUT ONE TOGETHER.

21 MR. SOLOMON: OKAY.

22 THE COURT: HOW -- SO I'M REALLY LOOKING  
23 FOR ADDITIONAL EVIDENCE --

24 MR. SOLOMON: RIGHT.

25 THE COURT: -- ON TWO AREAS. AND I THINK

1 YOU'VE HEARD MY CONCERNS. ONE CONCERN IS THAT THERE  
2 ARE AT LEAST TWO DOCUMENTS THAT APPEAR TO ME TO BE  
3 THE LINCHPIN OF YOUR ARGUMENT THAT THIS IS A  
4 NOT-FOR-PROFIT THAT ARE NOT PROPERLY BEFORE ME AS AN  
5 EVIDENTIARY MATTER. I'M DENYING YOUR REQUEST TO  
6 ADMIT THEM AS -- AND TO TAKE JUDICIAL NOTICE TODAY  
7 FOR TWO REASONS; ONE, I DON'T HAVE TO AND I'M NOT  
8 GOING TO; AND, SECOND, THAT THEY CAME IN LATE IN THE  
9 DAY. THEY NEEDED -- I GUESS THERE ARE THREE. TWO,  
10 THEY NEED A CHANCE TO RESPOND; AND, THREE, THE  
11 ARGUMENT HAS BEEN MADE -- I DON'T KNOW THAT IT'S  
12 TRUE -- BUT THE ARGUMENT HAS BEEN MADE THAT THE  
13 ARTICLES OF INCORPORATION THAT WERE PROVIDED WERE  
14 NOT ACCURATE AS OF WHAT WOULD BE THE RELEVANT DATE  
15 POTENTIALLY WHICH IS THE TIME THIS PARTICULAR LOAN  
16 WAS MADE.

17 AND SO I'M GOING TO REQUIRE ON THAT ISSUE  
18 THAT YOU PROVIDE AN APPROPRIATE REQUEST FOR JUDICIAL  
19 NOTICE OR A BUSINESS RECORDS' DECLARATION OR  
20 WHATEVER ELSE YOU WANT TO DO, BUT THAT YOU PUT THEM  
21 IN FRONT OF ME IN A PROPER EVIDENTIARY FORM.  
22 BECAUSE I AM OPENING THAT UP TO YOU, YOU CAN PROVIDE  
23 ANY EVIDENCE ON THAT ISSUE THAT YOU WISH TO AT THIS  
24 TIME.

25 HOW LONG WILL YOU NEED TO PROVIDE ME WITH

1 THAT EVIDENCE?

2 MR. SOLOMON: I -- CAN I ASK FOR 30 DAYS  
3 AGAIN?

4 THE COURT: SURE. I DON'T CARE.

5 MR. SOLOMON: I DON'T -- I DON'T CONTROL  
6 THAT. THAT'S -- I HAVE TO GO BACK TO THE CO-COUNSEL  
7 TO FIGURE OUT HOW THAT WORKS, SO --

8 THE COURT: TWENTY-EIGHT DAYS IS -- I  
9 USUALLY TRY AND DO TWENTY-EIGHT ON A THURSDAY JUST  
10 SO WE DON'T GET TO A SATURDAY WHICH WE INVARIABLY DO  
11 AT 30.

12 MR. SOLOMON: OKAY.

13 THE COURT: SO IS TWENTY-EIGHT DAYS  
14 SUFFICIENT?

15 MR. SOLOMON: IF IT ISN'T, I WILL LET THE  
16 COURT KNOW IMMEDIATELY, BUT I'LL PUT TWENTY-EIGHT  
17 DAYS.

18 THE COURT: ALL RIGHT. YOU CAN CERTAINLY  
19 --

20 MR. SOLOMON: SO TWENTY-EIGHT DAYS FROM  
21 TODAY?

22 THE COURT: YES. AND WHAT IS THAT, RUSS?

23 THE CLERK: APRIL 8TH.

24 THE COURT: ALL RIGHT. SO THE MINUTE  
25 ORDER IS GOING TO SAY THAT BY APRIL 8TH ADDITIONAL

1 EVIDENCE ON THAT ISSUE WILL BE PROVIDED. I WILL  
2 GIVE THE OTHER PARTY A -- AN OPPORTUNITY TO RESPOND.  
3 AND LET ME ASK YOU THIS: YOU'RE GOING TO PROVIDE  
4 THE EVIDENCE. I WILL ALSO ALLOW YOU TO FILE A  
5 DOCUMENT OF NO MORE THAN 10 PAGES, INCLUDING  
6 CAPTION, TELLING ME WHAT THE EVIDENCE IS AND WHY  
7 IT'S SUPPORTIVE ON THE ISSUE. HOW LONG WILL IT TAKE  
8 YOU TO FILE EVIDENTIARY OBJECTIONS, IF ANY, AND TO  
9 RESPOND TO THAT DOCUMENT?

10 MR. SMITH: TWO WEEKS.

11 THE COURT: TWO WEEKS?

12 THE CLERK: APRIL 22ND.

13 THE COURT: ALL RIGHT. SO 4/22. AT THAT  
14 TIME ON THAT ISSUE --

15 MR. SMITH: OH, I'M SORRY --

16 THE COURT: LET'S -- SO LET'S -- THAT'S  
17 NUMBER ONE.

18 MR. SMITH: OKAY.

19 THE COURT: THE SECOND EVIDENTIARY  
20 SUBMISSION THAT I THINK I NEED IS A MORE SUBTLE ONE.  
21 BUT YOU'VE HEARD THE ARGUMENT HERE, AND THE ARGUMENT  
22 IS THAT NOTWITHSTANDING THE STATUTORY LANGUAGE, THAT  
23 BECAUSE OF OTHER STATUTORY LANGUAGE AND BECAUSE OF  
24 GRAMMAR, THAT THIS -- THERE NEEDS TO BE SOMETHING  
25 MORE THAN SIMPLY THE SIGNING OF A GUARANTEE. I

1 DON'T DISAGREE WITH THAT POSITION. I DON'T THINK,  
2 AGAIN, WE CAN HAVE A FRAUDULENT GUARANTEE FROM A  
3 NOT-FOR-PROFIT AND HAVE THAT BE WHAT THE STATUTE  
4 INTENDS.

5 SO I'M GOING TO GIVE YOU AN OPPORTUNITY TO  
6 PROVIDE ADDITIONAL EVIDENCE ON HOW THIS WORKED AND  
7 THAT IT WORKED. THAT'S -- THOSE ARE MY WORDS. THEY  
8 DON'T NECESSARILY NEED TO BE THE ONES THAT YOU --  
9 THAT YOU USE. THAT EVIDENCE SHOULD, AT A MINIMUM I  
10 THINK, SHOW ME EITHER THAT TERI HAD THE FINANCIAL  
11 ABILITY TO RESPOND TO THESE GUARANTEES OR THAT TERI,  
12 IN FACT, DID FUND. I -- I AM AT THIS POINT  
13 CONVINCED BY THE ARGUMENT THAT THE FUNDING HAS TO BE  
14 PROGRAMMATIC RATHER THAN THE INDIVIDUAL LOAN. SO  
15 I'M NOT REQUIRING EVIDENCE THAT THIS LOAN WAS  
16 FUNDED. I AM REQUIRING EVIDENCE THAT THE PROGRAM  
17 UNDER WHICH THIS LOAN WAS MADE WAS FUNDED OR  
18 OTHERWISE. CAN YOU DO THAT IN THE SAME 28-DAY  
19 PERIOD?

20 MR. SOLOMON: I WILL, AGAIN, TRY TO, YOUR  
21 HONOR.

22 THE COURT: AND IF YOU CANNOT, THEN EITHER  
23 GET A STIPULATION WITH THE OTHER SIDE TO CONTINUE IT  
24 OR FILE A MOTION.

25 MR. SOLOMON: OKAY. I WILL FIND OUT

1 TODAY.

2 THE COURT: ALL RIGHT. AND I JUST WANT TO  
3 SAY, WE ARE ALL OPERATING UNDER AN UNUSUAL SET OF  
4 CIRCUMSTANCES. I'VE SPENT MOST OF THE PAST TWO  
5 DAYS, AMONG OTHER THINGS, TRYING TO FIGURE OUT  
6 WHETHER I'M GOING TO FLY JUDGES TO APPELLATE  
7 ARGUMENTS IN POINTS REMOTE AND FIGURING OUT -- I  
8 PERSONALLY AM TAKING A VACATION, SO I REALLY -- I  
9 DON'T HAVE A GOOD PORTFOLIO FOR SAYING I WON'T GET  
10 ON A PLANE TO SAN FRANCISCO, BUT SOME OF MY  
11 COLLEAGUES AREN'T SO KEEN ON THAT. SO BE KIND TO  
12 EACH OTHER, OKAY? THAT'S -- THAT'S IMPORTANT RIGHT  
13 NOW. AND IF THERE ARE ISSUES, INCLUDING HEALTH  
14 ISSUES THAT MAKE PEOPLE UNABLE TO MEET DEADLINES,  
15 I'M GOING TO BE RECEPTIVE TO THAT, AND I EXPECT YOU  
16 TO BE RECEPTIVE TO IT WITH EACH OTHER.

17 NOW, YOU WILL HAVE AN OPPORTUNITY TO  
18 RESPOND, AND I'M ALSO GOING TO ALLOW YOU WITH THAT  
19 TO FILE ANOTHER ADDITIONAL 10-PAGE DOCUMENT,  
20 INCLUDING CAPTION PAGE SO YOU DON'T HAVE TO DO A  
21 TABLE, THAT DISCUSSES THE NEW EVIDENCE YOU'RE  
22 PROVIDING AND BRINGS IT INTO THE MOTION.

23 I WILL ALLOW YOU TO RESPOND WITH  
24 EVIDENTIARY OBJECTIONS AND YOUR OWN 10-PAGE  
25 DOCUMENT. AND, AGAIN, THE SAME TWO WEEKS?

1 MR. SMITH: YES, YOUR HONOR. BUT, SO --

2 I'M SORRY, JUST SO I UNDERSTAND, SO IT'S -- SO

3 THEY'RE -- BUT THESE ARE TWO SEPARATE --

4 THE COURT: I'M GOING TO --

5 MR. SOLOMON: I WAS -- I WAS GOING TO ASK

6 THE SAME QUESTION.

7 THE COURT: I THINK THEY SHOULD BE

8 SEPARATE.

9 MR. SMITH: OKAY.

10 THE COURT: AND THE REASON IS, IT DOES NOT

11 SEEM TO ME -- IT MAY BE THE SAME DECLARANT, AND IF

12 IT IS, I'M NOT GOING TO SCREAM IF THEY'RE COMBINED.

13 BUT THEY'RE TWO DISCRETE ISSUES, AND IT'S GOING TO

14 BE EASIER FOR ME TO --

15 MR. SMITH: YES, OF COURSE.

16 THE COURT: -- CONSIDER THEM.

17 MR. BUSH: AND THEN IS THIS A TEN-PAGE

18 DOCUMENT PER PARTY PER ISSUE OR IN --

19 THE COURT: YES.

20 MR. BUSH: OKAY.

21 THE COURT: HE'S GOT TWO TEN PAGES; YOU

22 HAVE TWO NO MORE THAN TEN PAGES.

23 MR. SMITH: NO MORE THAN TEN PAGES.

24 THE COURT: INCLUDING CAPTION.

25 MR. SOLOMON: AND COMPLIES WITH LOCAL



1 RULES.

2 THE COURT: AND COMPLIES WITH LOCAL RULES.  
3 TEN PAGES. AND I THINK YOU'LL FIND THE TEN PAGES  
4 IS, YOU KNOW -- AND IF YOU WANT TO GIVE ME A LIST OF  
5 CASES IN A TABLE OF CONTEXT -- CONTENTS AND IT'S  
6 LESS THAN TEN PAGES, I WON'T SAY NO. SO -- AND I  
7 THINK WITH THAT, I THINK I'M -- I WILL MAKE A  
8 DECISION WHETHER I NEED TO HAVE ADDITIONAL ORAL  
9 ARGUMENT. I'M GOING TO TAKE IT UNDER SUBMISSION AT  
10 THAT POINT UNLESS I ADVISE THE PARTIES THAT I NEED  
11 SOMETHING, SOMETHING FURTHER. I ANTICIPATE -- I DO  
12 NOT HAVE ANY ANTICIPATION THAT I WILL WRITE FOR  
13 PUBLICATION ON THIS. THERE'S PLENTY THAT'S BEEN  
14 PUBLISHED, I DON'T NEED TO. BUT I THINK THE PARTIES  
15 WILL GET A -- AN ORDER FROM ME THAT EITHER IS  
16 SOMETHING ALONG THE LINES OF THE TENTATIVE OR THAT  
17 IS MORE TRUNCATED BUT INVITES COMPLETE FINDINGS. I  
18 RECOGNIZE THERE MAY BE AN APPEAL. I WANT TO MAKE  
19 SURE THERE'S A GOOD RECORD OF WHAT I'VE ACTUALLY  
20 DECIDED --

21 MR. SMITH: YES, YOUR HONOR.

22 THE COURT: -- AND WHAT I -- YOU KNOW,  
23 WHERE I'M GOING. I'M -- I RECOGNIZE THAT THESE  
24 ISSUES ARE POPPING UP AROUND THE COUNTRY. AND SO IF  
25 THERE ARE QUESTIONS, YOU CAN COMMUNICATE WITH EACH

1 OTHER AND TRY AND RESOLVE THEM.

2 DO I NEED A SCHEDULING ORDER, OR DO YOU  
3 THINK I'VE BEEN CLEAR ENOUGH TODAY?

4 MR. SOLOMON: I -- I'M FINE IF YOU WANT TO  
5 --

6 MR. SMITH: I THINK -- I THINK WE'RE OKAY.

7 MR. BUSH: I -- AT THIS POINT, YOUR HONOR,  
8 THE ONLY THING THAT WE HAVE ON THE -- IN TERMS OF A  
9 SCHEDULE IS WE HAVE A --

10 MR. SOLOMON: OH.

11 MR. BUSH: -- DISCOVERY CUT-OFF DATE.

12 MR. SOLOMON: YEAH, OKAY.

13 THE COURT: RIGHT.

14 MR. BUSH: JUNE 18. I WOULD SUGGEST THAT  
15 AS LONG AS WE HAVE A STATUS CONFERENCE BEFORE THAT  
16 DATE, YOU KNOW, MAYBE END OF MAY, WE CAN REVISIT THE  
17 DISCOVERY ISSUE LATER.

18 THE COURT: WHEN IS -- YEAH, WHEN IS THE  
19 -- SO WHEN IS THE LAST DAY? I'M GETTING THIS -- I'M  
20 GOING TO GO BACK IN MY NOTES BECAUSE I ACTUALLY  
21 WROTE IT DOWN, RUSS. THE RESPONSE IS 4/22.

22 IT'S REALLY A QUESTION OF WHEN I WILL BE  
23 ABLE TO GET SOMETHING OUT. LET -- IF I GRANT  
24 SUMMARY JUDGMENT, WE'RE DONE. IF I DON'T, THEN WE  
25 NEED A STATUS CONFERENCE. AND I THINK WHAT I'M

1 GOING TO DO IS SET A STATUS CONFERENCE FOR END OF  
2 MAY. BY THEN I SHOULD HAVE BEEN ABLE TO -- UNLESS  
3 I'M SICK OR SOMETHING -- I SHOULD HAVE BEEN ABLE TO  
4 LET YOU KNOW ON SUMMARY JUDGMENT. IF I DON'T GRANT  
5 SUMMARY JUDGMENT, THEN AT THE STATUS CONFERENCE,  
6 BOTH SIDES SHOULD REQUEST ME TO EXTEND THE DISCOVERY  
7 CUT-OFF. I THINK THAT'S THE EASIEST WAY. AND YOU  
8 CAN -- SO I'M NOT DOING IT TODAY. I'M NOT SAYING  
9 DON'T DO DISCOVERY, BUT I'M GIVING YOU A PRETTY,  
10 PRETTY FIRM ASSURANCE THAT YOU DON'T NEED TO WORRY  
11 ABOUT IT BECAUSE I WILL GIVE YOU MORE TIME. I  
12 RECOGNIZE THAT THERE'S --

13 MR. SMITH: OKAY.

14 THE COURT: -- THERE'S A MATTER UNDER  
15 SUBMISSION THAT MIGHT BE CASE-DISPOSITIVE.

16 MR. SMITH: OKAY.

17 THE COURT: AND I THINK THAT'S THE BEST  
18 THING TO DO BECAUSE THEN I CAN EXTEND IT TO A POINT  
19 IN TIME THAT MAKES SOME SENSE GIVEN WHAT YOU  
20 ACTUALLY INTEND TO DO AND WHERE YOU INTEND TO GO  
21 WITH IT. DOES THAT MAKE SENSE?

22 MR. SOLOMON: THAT MAKES SENSE TO ME, YOUR  
23 HONOR.

24 THE COURT: OKAY. ALL RIGHT.

25 ALL RIGHT. THANK YOU VERY MUCH FOR YOUR

1 GOOD ARGUMENTS.

2 MR. SOLOMON: ARE YOU GOING TO SET THE  
3 DATE IN MAY NOW OR --

4 THE COURT: OH, YES. THAT WOULD BE AN  
5 EXCELLENT IDEA. RUSS?

6 THE CLERK: THANK YOU. SO, YOUR HONOR, WE  
7 COULD DO MAY 27TH AT 10:00 O'CLOCK.

8 THE COURT: OKAY. I'M GOING TO -- NO,  
9 WE'RE NOT.

10 THE CLERK: NO?

11 THE COURT: BECAUSE I HAVEN'T TOLD YOU  
12 THIS. LET -- THERE'S AN OUTSIDE -- I'M DOING A  
13 WEDDING ON THE --

14 THE CLERK: OH, THAT'S RIGHT.

15 THE COURT: -- THE 24TH. AND I MAY COME  
16 BACK THE 27TH IF I STAY TO --

17 THE CLERK: OKAY.

18 THE COURT: -- TAKE HANK TO A BASEBALL  
19 GAME. SO LET'S DO IT THE 20 -- YEAH, LET'S DO IT  
20 THAT DAY. THAT WOULD BE BETTER.

21 THE CLERK: JUNE 3RD AT 10:00 A.M.

22 MR. SMITH: THAT'S MY BIRTHDAY. YEAH,  
23 THAT'S --

24 THE COURT: OKAY. THAT'S MY BROTHER'S  
25 BIRTHDAY.

1 MR. SMITH: IT'S AUSPICIOUS.

2 THE COURT: YES. AND I -- YOU KNOW, I'M  
3 JUST TRYING TO -- RUSS IS HELPING OUT WHILE MY USUAL  
4 COURTROOM DEPUTY IS CELEBRATING THE BIRTH OF HER  
5 CHILD AND NOT SLEEPING, AND HE MAY HAVE THE JOY OF  
6 MOVING CALENDARS AGAIN THAT WEEK, SO HE'S -- HE'S  
7 GOING TO BE FULLY-INVESTED IN THE JOB BEFORE HE GETS  
8 TO GO BACK TO HIS USUAL DAY JOB UNLESS SHAWNA JUST  
9 DOESN'T COME BACK, WHICH SHE'S LOVING THAT BABY. SO  
10 WITH THAT --

11 THE CLERK: YOU HONOR, JUST FOR  
12 MINUTE-ORDER PURPOSES AND FOR THE RECORD, DO -- ARE  
13 WE TAKING THE MOTION OF SUMMARY JUDGMENT UNDER  
14 SUBMISSION, OR WOULD YOU LIKE ME TO CONTINUE IT?

15 THE COURT: IT'S GOING TO GO UNDER  
16 SUBMISSION AND BRIEFING, SO WE'RE NOT GOING TO MOVE  
17 THAT TO THE DATE. IF I SCHEDULE ORAL ARGUMENT, I  
18 WILL SCHEDULE IT FOR THAT DATE OR DO SOMETHING  
19 TOTALLY DIFFERENT, DEPENDING ON WHAT COMES IN AND  
20 HOW I DECIDE TO PROCEED. IT MIGHT BE SOONER, MIGHT  
21 BE LATER, BUT I WILL KEEP IN MIND YOUR DISCOVERY  
22 CUT-OFF. AND IF I DON'T, AGAIN, YOU CAN COMMUNICATE  
23 JOINTLY THROUGH THE LAW CLERK, AND I -- I WON'T  
24 LEAVE YOU HANGING. ALL RIGHT.

25 MR. SOLOMON: OKAY. THANK YOU, YOUR

1 HONOR.

2 THE COURT: THANK YOU VERY MUCH.

3 MR. SMITH: THANK YOU, YOUR HONOR.

4 MR. BUSH: THANK YOU, YOUR HONOR.

5 THE CLERK: AND THAT CONCLUDES YOUR 10:00

6 O'CLOCK CALENDAR, YOUR HONOR.

7 (WHEREUPON, THE PROCEEDING CONCLUDED AT 11:12 A.M.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

I, JENNIFER GIBSON, CERTIFIED SHORTHAND REPORTER, DO HEREBY  
CERTIFY:

THAT I REPORTED IN SHORTHAND THE PROCEEDINGS HELD IN THE  
FOREGOING CAUSE ON THE 11TH DAY OF MARCH, 2020;

THAT MY NOTES WERE LATER TRANSCRIBED INTO TYPEWRITING UNDER  
MY DIRECTION; AND THAT THE FOREGOING TRANSCRIPT CONTAINS A  
CORRECT STATEMENT OF THE PROCEEDINGS.

DATED THIS 11TH DAY OF MARCH, 2020.

/S/ JENNIFER GIBSON

---

JENNIFER GIBSON, CSR NO. 12802